the plaintiff in error was a lunatic, [illegible] if it had [illegible] that she was an insane or [illegible] statute providing for the appointment of a guardian for [illegible] ed person or insane person who is incapable [illegible] ing their property. A lunatic, however, is not [illegible] or insane person, but is a badly distr[illegible] son. [illegible] tic includes every idiot, insane or distr[illegible] d person. ([illegible] 13, Sec. 1, P. 6).

From an examination of the record [illegible] dence fully sustains the allegation that the plaintiff in error was a distracted person and of unsound [illegible] able of transacting business [illegible] care of her property. In the circuit court on appeal a plea was filed alleging that the plaintiff in error was not a resident of Ellis County, but [illegible] resident of Vermilion County; this plea is defective in that not alleging that the plaintiff in error was not a resident of Ellis County at the time of the filing of the petition, but [illegible] overruled a demurrer to the plea and heard the cause, [illegible] ing with the trial and appointing a conservator [illegible] found and held that it had jurisdiction [illegible] person of the plaintiff in error, and that she was a resident of Ellis County at the time of the filing of this petition. The record contains no bill of exceptions, consequently no questions of fact are [illegible] for the determination of this court, and unless some error of law has been committed and shown upon the record in disposing of the [illegible] by the trial court, then the judgment must be affirmed.

While the petition is informal there is no defect in the petition, it is sufficient to give the court jurisdiction. Upon the contention that the circuit court did not acquire jurisdiction for the reason that the clerk did not mark the transcript sent from the county court on appeal as having been filed in his office; merely failing to file mark this transcript could not deprive the

circuit court of its [illegible]jurisdiction ; [illegible]
the transcript [illegible]
whether [illegible] "filed" by [illegible], [illegible]
i[illegible] file, [illegible] control, [illegible]
diction of the subject [illegible] .

The questions [illegible] raised [illegible]
error [illegible] technical kind. [illegible]
the question of jurisdiction, [illegible]
of general jurisdiction upon questions [illegible] matter, [illegible]
obtained jurisdiction [illegible] person, unless the record discloses
affirmatively [illegible] is not acquired jurisdiction, [illegible]
court must presume, where there is no bill of exceptions,
evidence sufficiently showed [illegible] were jurisdiction [illegible]
persons and subject matter.

We find no reversible error in [illegible] proceedings and judgment is Af-
firmed. A F F I R M E D .

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[illegible] No. 60[illegible] - [illegible] Oct. [illegible] - [illegible]

Filed Dec. 27, 1913-

C.C. Digby, et al.,
Plaintiffs in error-

[illegible] ;

V[illegible]nora I. [illegible],
Defendant in error-

185 I.A. 8

Philbrick, J.

[illegible] over from the defendant [illegible] is ion [illegible] in error from defendant in error by [illegible] in [illegible] rendered to defendant in error in [illegible] of a certain stock of merchandise owned by defendant in error.

At the close of the plaintiffs evidence in [illegible] defendant entered a motion to exclude the evidence and direct a verdict in his favor; this motion was granted and the jury instructed to return a verdict for defendant upon which judgment was entered.

The declaration in this case alleges that plaintiffs in error found and procured for the defendant in error a person who was ready, willing and able to make an exchange of land for the stock of merchandise owned by defendant in error, [illegible] such person and presented the same to the defendant in error that a trade was afterwards consummated by and between defendant in error and such persons so produced by the plaintiffs in error and such persons so [illegible]. The evidence discloses that plaintiffs in error obtained their information concerning defendant's stock of merchandise and her desire to dispose of it from the [illegible] defendant in error who informed one of the plaintiffs in error that defendant in error desired to exchange a stock of merchandise for real estate, or to sell the same for cash, and after plaintiffs in error obtained this information one of them went to defendant in error and informed her that he had a man by the name of Taylor who would trade for this stock of goods. The plaintiff in error who

conveyed his interest [illegible] and is not [illegible] who he was representing, or [illegible] was prepared [illegible] find [illegible] or at her request.

The record discloses that Taylor, the [illegible], was unable to make a trade for this stock of goods [illegible] sufficient means therefor, either in [illegible] of money, [illegible] plaintiffs in error [illegible] to defendant in error, Taylor, the intended purchaser, claimed to have been procured by plaintiffs in error, who then negotiating with property [illegible] Roberts for a trade for Missouri land, and in order for Taylor to have made the trade with defendant in error it was necessary that he interest Roberts in this trade by having Roberts joined with him and put the Missouri land in as a part of the consideration for defendant's in error stock of merchandise, Taylor [illegible] the consideration. Taylor was unable to secure the co-operation of Roberts and he then went to the defendant in error and informed her that he was not able to make this trade, and it was abandoned by both parties. Taylor, however, desiring to secure this stock of merchandise soon after began to negotiate with one Alberts and induced him to join in making the trade. This man Alberts furnished for the purpose of this trade a piece of real estate which was valued at $7500.00 and put in $5,000.00 in cash. Taylor furnished real estate to the value of about $4,000.00., and with the co-operation of Alberts a trade was consummated with the defendant in error, but plaintiffs in error had no knowledge that such a deal was being made or had been made by the defendant in error until some considerable time after it was consummated.

The man furnished to the defendant in error in contemplation of this trade was Taylor and the record discloses positively that he was never able to make or carry on a trade, [illegible] no sufficient means or property therefor, and by reason thereof the plaintiffs in error did not furnish or procure, or present to the defendant in error any person who was able to make this trade, and upon

the facts thus shown the trial court directed a verdict for the defendant, and the only error assigned on this record argued upon this record by the plaintiffs in error is the action of the trial court in so directing this verdict.

We are satisfied from an examination of the record that the trial court could not correctly have done otherwise than direct a verdict for the defendant in error. The evidence does not sustain the plaintiffs in error contentions, nor sustain the allegations of their declaration, and giving their evidence the most favorable construction that can be put upon it, it is not sufficient to warrant a verdict in favor of the plaintiffs in error. The trial court did not err in directing the verdict and rendering judgment thereon. Judgment is therefore affirmed.

A F F I R M E D.

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E. R. E.
Kirkbrought

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Ge . . . 6097- [illegible]

[illegible]

[illegible]

[illegible]

Appellant,

vs. ;

Turner-Hudnut Co., (Inc.)
Appellee.

Philbrick, J.

A [illegible] dealer in [illegible], [illegible], at [illegible]land, Ohio. Appellee is a corporation doing [illegible] at Pekin in Tazewell County. In connection [illegible] paint business appellee owns and operates several boats [illegible] Illinois River.

The declaration avers [illegible] lant a barrel of paint to be used in painting [illegible] boats owned by appellee; that an order for this paint was [illegible] lee to appellant, and in compliance with [illegible] paint was shipped to appellee.

Appellee refused to receive the paint and notified appellant that it was at Henry, Ill., subject to his order, and requested advice as to what disposition appellee should make of it. Appellant refused to accept a return of the paint and brought this suit to recover the price of the paint.

The trial court directed a verdict for appellee. Appellant prosecutes this appeal to reverse the judgment entered in the trial court. Appellee insists that the judgment is right, and in support of its contention, insists that during the month of October in the fall of 1911 one A.E. Thompson, a traveling agent representing appellant called upon him and solicited an order for paint, and appellee asked the price of the paints suitable for painting a boat, and that Mr. Thompson, the agent of appellant, informed him that they had paint suitable for painting boats at fifty cents a gallon, and that having been quoted a price by Mr.

Thompson that he order ed for that quotation, and that when the xx paint came under his order the price charged xxxxxx was one dollar and twenty-five cents per gallon. Appellee immediately notified appellant that the paint was at the railroad station, that he declined to receive it, and that by reason thereof he is not liable therefor.

The evidence in this record discloses that at the time that Mr. Thompson visited appellee no order was given for paint, no specific kind of paint was talked of, other than a paint suitable to paint a boat; -------- appellee was requested by Mr. Thompson that if he desired any paint to send an order direct to appellant therefor. From the time that Mr. Thompson called upon appellee no further communication was ever had between appellee and Mr. Thompson or appellant, until a letter of date April 15th . 1912 . There is nah nothing in the record to show that Mr. Thompson ever notified appellant of any conversation he had had with appellee.

On April 15th, 1912, nearly six months after this conversation with Thompson, appellee sent the following order to appellant by mail;

"Pekin, Ill., April 15th, 1912-

"The Warren Refining Co.,
'Cleveland, Ohio.

'Gentlemen:-

Please ship to us as soon as possible, at Henry, Ill., one barrel of the black paint, suitable for our boats. Get it out as quickly as possible, sending the bill to us here at Pekin.

Yours truly,

'Turner-Hudnut Co'".

On April 17th, appellant replied to this communication as follows;-

'Messrs. Turner-Hudnut Co.,
'Pekin, Illinois.

'Gentlemen:-

'Your letter of the 15th inst. at hand, and in reply will say that we will ship you a barrel of Special Ebonite Black Paint suitable for your boats. It will go forward at once.

'Thanking you for this order, we are,
Very truly yours,

'The Warren Refining Co." ".

This barrel of paint was shipped on or about the 26th of April and delivered to the Erie Shore and Michigan Southern Railway consigned to Turner-Hudnut Co., Peoria, Ill., destination Peoria, Ill., the evidence further discloses that appellant manufactured and handled various grades of paint suitable for painting boats varying in price all the way from fifty cents per gallon to two dollars per gallon, that the market value of this barrel of paint shipped to appellee was one dollar and twenty-five cents per gallon, and that was the reasonable customary price therefor.

The only question to be determined upon this record is whether or not the written order of dated April 12th, 1912, sent by appellee to appellant, and its acceptance on April 17th, 1912, as shown by the correspondence, constituted a contract of purchase and sale.

It cannot be seriously contended that the conversation had between appellee and appellant's agent Thompson constituted a contract, or that it was any part of the contract created by the order of April 12th, and its acceptance on April 17th, if such order and acceptance constituted a contract.

The order for the barrel of paint and its acceptance constitute a complete written contract between these parties, and although a conversation was had between appellee and Thompson, it must fall within the rule that where the contract is in writing the writing must control. (U.S.S.W.Co., vs. Lockwood, 110 Ill., App. 589). Appellee at no time informed appellant that he had any such conversation with appellant's agent, and makes no mention of it in his order of April 12th. By that order he left the kind and quality of paint to be selected by appellant. If he had desired to limit the price of paint ordered to fifty cents per gallon, or, to have made a part of the conversation with Thompson a part of the contract he should have included this in his written order for the barrel of paint of April 12th, and not having done so he cannot now insist that the price of paint which he ordered was limited to fifty cents

per gallon. The delivery of this paint to the railroad company for transportation to appellee under this order completed the sale and a delivery of k this paint, subject to the right of stoppage in transit, and appellee is bound by his contract and cannot refuse to accept the paint upon its arrival at Henry, Ill., and require appellant to re-take it.

The trial court erred in directing a verdict for appellee. Judgment is reversed and cause remanded.

R. & .-

Dr. —

Dr. Green —

J —

185 H 22

185 I.A. 22

Gen. No. 6033- October Term, 1913-

Filed Dec. 27, 1913-

Vada C. Stines,

Plaintiff in Error-

vs. ; Error to Circuit Court of Macon

Annie E. Brock, County.

Defendant in Error-

FLEDDERMAN, J.-

Lawson E. Martin died intestate August 1, 1911, leaving Mary P. Martin, his widow, and Vada C. Stines and Annie E. Brock, his children and only heirs at law, and leaving a personal estate of $3,500. His widow, Mary P. Martin, died April 11, 1912, leaving personal estate consisting only of widow's share in the estate of her deceased husband. Vada C. Stines, plaintiff in error, being the eldest child, on April 12, 1912, filed her petitions in the County Court praying for letters of administration to issue to herself in each estate. The younger sister, Annie E. Brock, defendant in error, filed objections in each estate to the appointment of said Vada C. Stines, as administratrix thereof, and petitioned to have some disinterested person appointed administrator of each estate, and subsequently filed a petition in each estate for her own appointment as administratrix thereof. The County Court overruled the objections and appointed plaintiff in error administratrix of each estate. Defendant in Error appealed from said orders to the Circuit Court, where the cases were consolidated and the Circuit Court upon a hearing of the consolidated causes ordered letters of administration to issue to Vada C. Stines in the estate of the father, and to Annie E. Brock in the estate of the mother. From this order Vada C. Stines has sued out this writ of error.

On the hearing it was shown that the estate of the father consisted principally of a promissory note for $3,500.00 executed by the husband of Annie E. Brock, and it also appeared that Vada C. Stines claimed to own most of the household goods and intended to

file a [illegible] against the estate [illegible] .

There was no abuse of discretion [illegible] in making these appointments, as it was ordinarily [illegible] appoint Vada C. Stines administratrix of the [illegible] to collect the assets of that estate which consisted [illegible] the note executed by the husband of Annie Brock, [illegible] Annie L. Brock administratrix of the estate of [illegible] so that she could defend the estate against [illegible] sister.

The judgment of the Circuit Court is Affirmed-

[illegible] .

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185 I.A. 33

Gen. No. 6039- Oct. Term, 191 - Appeal No. 1-

Filed December 27, 1913-

Janet Teal, by [illegible] W. Teal,
her Guardian- Appellee

vs-. ; Appeal from the Circuit Court of

St. Louis & Springfield Railway Clay County.
Company., St. Louis, Springfield
and Peoria Railroad Company.,
Appellant-

MIDDLEKAMP, J.-

This is an action on the case brought by appellee for personal injuries received by appellee by reason of her falling from an interurban car while she was a passenger thereon. The jury returned a verdict in favor of appellee and assessed her damages at $1,000.00; on which verdict judgment was rendered.

The declaration consists of an original and an additional count. The original count, after charging the ownership and operation of the car in question in the defendants, alleges that the plaintiff, desiring to become a passenger on a certain car, signalled the car to stop and the motorman thereupon stopped the car and she, with all due care and caution, mounted upon the rear platform and attempted to enter through the rear door of said car intending to ride as a passenger to Moody crossing, a point further south; that upon attempting to enter the door of the car from the platform she found it locked, or so lightly closed that she could not enter the same, and no conductor or other employee of the defendant was there to assist her in entering the car or in opening the door; that it was the duty of the defendant to provide for her a safe and speedy admission into said car from the platform thereof and that by reason of the failure of the defendant so to do she was compelled to remain upon the platform; that such car immediately upon her mounting the platform started forward with accelerating speed and that at a point near said Moody crossing while she was still

on the rear platform trying to enter through the door and using reasonable care and caution for her safety, said car gave a lurch or jerk which threw her off while it was going in rapid motion, from by she was thrown upon the ground and injured. The additional count, after the same preliminary allegations, avers that it was the duty of the defendant not to start said car in motion until the plaintiff had had a reasonable opportunity to enter said car, and that while she was upon the rear platform and attempting to enter the same through the door thereof, said car started in rapid motion and continued moving with accelerating speed and at a point near said Moody crossing before she was able to enter the car, while she was using due care and caution for her safety, she was by the motion and swaying of such car violently thrown off said car upon the ground. To these counts the general issue was filed.

It is urged that a railroad company is not liable for injuries to a passenger thrown from the platform of a car where the car made no unusual or swaying motions; that the declaration does not allege, nor does the proof show, that this car made any unusual swaying or lurching but only such as was incident to the usual and ordinary operation of the car and therefore the defendant is not liable. This is undoubtedly the rule in causes of action based upon the swaying or lurching of the car when a passenger voluntarily stands on the platform thereof, but in neither count in this case is the gravamen of the action laid as the swaying or lurching of the car. In the original count the allegations charged the failure of the defendant to provide a safe and speedy admission into the car by reason of allowing the door thereof to become locked or so tightly closed that the plaintiff could not open it and was thereby compelled to stand upon the platform, from which she was thrown by the swaying of the car. The additional count is based upon the negligence of the defendant in starting the car before she had had a reasonable opportunity to enter the door thereof. The application of this principle of law cannot be applied to the case at bar.

The evidence tends to show that the accident happened between eight and nine o'clock, on the night of the 26th of January, 1912-

The plaintiff, a colored girl about seventeen years old, signalled the car to stop at Cherry street in the city of Chattanooga; it was a cold, dark night-~~and after plaintiff had~~ and after plaintiff had mounted the rear platform of the car she attempted to enter the rear door and for some reason the doors would not open; that while she was thus trying to open the door, either by the swaying or a sudden lurch of the car, she was thrown from the platform on to the ground. She lay there unconscious until the crew of a northbound car discovered her and took her to Car invile. The principal injury sustained by the plaintiff was a fracture of the auditory canal in her left ear. The evidence tends to show that she remained unconscious for a number of days after the injury and that since said accident her hearing has been impaired and her physical condition generally has been enfeebled.

The evidence of the defendant tends to show that the doors, which were double sliding doors, were partly open all the time and that plaintiff stood on the platform and made no effort to open them and enter the car. The evidence is conflicting on these different contentions and as the verdict is not manifestly contrary to the weight of the evidence it cannot be disturbed on that ground.

Complaint is made of the 6th instruction given on behalf of the plaintiff, which, in substance, tells the jury that after the plaintiff got on the car it became the duty of the defendant to see that the plaintiff had reasonable time and opportunity and facilities for entering such car in safety and that if they believe from the evidence that before she could open the door and safely enter the car the conductor, knowing that the plaintiff was then outside the door and upon the platform, negligently caused such car to start forward and that such car did start forward and that by the motion of such car the plaintiff, while using reasonable care was thrown off, etc., then the jury should find the defendant guilty. This instruction is erroneous in that it allows a recovery if the conductor negligently caused such car to start forward, without the limitation

"before she had a reasonable opportunity to enter it", but when all the instructions are read together, particularly in connection with defendant's 11th instruction, we do not think that the jury could have been misled. Defendant's 11th instruction tells the jury that they can not find a verdict for the plaintiff under either count of the declaration unless they believe the preponderance of the evidence is either that plaintiff was thrown from the car by a lurch of said car or as a direct result of the car starting before she had a reasonable opportunity to enter it, etc.

We do not think the other points raised constitute reversible error and the judgment of the Circuit Court must therefore be affirmed.

Oct. Term
1913

R. B. Shirley
J.

185 A 44

185 I.A. 44

Gen. [illegible]

Filed Dec. 27, 1913-

Paul Kuhn [illegible] Elizabethsdrn.,
Appellants,

[illegible]

Cleveland, Cincinnati, Chicago [illegible].

St. Louis Railway Co.,
Appellee.

APPEAL FROM [illegible].-

[illegible] action [illegible] against [illegible] receiver [illegible] for breach of contracts of lading for the transportation of [illegible] bushels of wheat [illegible] Illinois, to Chattanooga, Tenn. [illegible] conversions one count for each bill of lading. [illegible] each had in them the following [illegible] "[illegible] action [illegible] covered by this bill of lading [illegible] unless [illegible] by law or with a permission is [illegible] original bill of lading or given in writing [illegible] the [illegible]".

Appellants [illegible] sale [illegible] Terre Haute, Ind. On October 1[illegible], 1910, [illegible] various [illegible] and customers the following circular letter:- "On basis of [illegible] market we could sell you I.A.N. [illegible] Association, [illegible] to [illegible] weights and inspection final, subject to [illegible] draft, [illegible] No. 2 Red Winter Wheat $1.11 1-4 [illegible] Del. Above [illegible] for [illegible] in [illegible]. In your acceptance, [illegible] State [illegible]. [illegible] & Co."

On [illegible] of the circular letters was [illegible] received by W.G. Oehmig, [illegible] at Chattanooga. [illegible] same he held a telephone conversation [illegible] Milling Company in regard to [illegible] in [illegible] of 5,000 bushels of wheat to it, and thereafter telegraphed to [illegible] to "Ship [illegible] City 5,000 bushels strictly up to grade No. 2 red wheat at price quoted and confirm [illegible]". Whereupon appellants telegraphed to Oehmig as follows;- "Confirm 5,000 bushels Terre Haute No. 2 red

wheat 1.11 1/4 Chatta[illegible], [illegible] morrow". And followed it [illegible] follows:- "I [illegible] through [illegible] Mountain City [illegible] Terre Haute. [illegible] wheat $1.11 1-4 per bushel [illegible] Chattanooga; [illegible] and [illegible] ion Field; [illegible] If [illegible] above is not in accordance [illegible] immediately wire me at his own expense. [illegible]".

[illegible] on [illegible] Mountain City [illegible] the following letter:- "We have your Mr. [illegible] morning for 5,000. bushels of choice [illegible] wheat. [illegible] the wheat [illegible] be choice. [illegible] not satisfactory. [illegible] and it thoroughly and if this is not satisfactory [illegible] not want anything but [illegible], sound, sweet wheat". [illegible] in the same day, October 17, 1910, shipped [illegible] bushels of wheat to the Mountain City Milling Company. [illegible] at Chattanooga [illegible] was inspected by J.P.Wilmit, a public weighmaster of the Chatnooga market, about October 20th, and [illegible] a telegram was sent by the Milling Company to [illegible] informing them that the wheat could not be made [illegible] to accept the wheat. The carload of wheat was reconsigned and resold by appellants without any loss [illegible] on account of said car. The wheat in the remaining four cars was then stored in sacks in a warehouse, [illegible] for six months [illegible] it was sold by appellants at a public sale, and appellants claim they have suffered a loss of $1,000.00 on the contract price of said wheat after paying the freight, cost of sale, [illegible], insurance, storage and handling.

Appellants base their claim on the [illegible] that appellee through its agent, the connecting carrier, permitted an inspection

of these [illegible], [illegible] of [illegible] [illegible] [illegible]

C nning Co. v. [illegible], 142. 561.

[illegible] this grain, [illegible] of sacking, storage, [illegible] in [illegible] of any loss or damage to the [illegible] failure of said [illegible] Company to accept said [illegible] vi nce, and the law [illegible] thereto, [illegible] the cheat to the filling [illegible].

While the evidence does not [illegible] police through its connecting carrier gave any affirmative permission [illegible] public inspector to inspect [illegible] cheat in the [illegible] case, [illegible] that it acquiesced in or consented thereto, [illegible] opinion that under said provisions in the bills of lading [illegible] to prevent such inspection, [illegible] technical violation of the terms of the contr ct of carriage in [illegible] is [illegible] respect [illegible] that appellants are entitled to nominal damages.

The judgment of the circuit court [illegible] be affirmed.

A F F I R M E D.

Oct. 1913

C. D. Myers J.

185 I.A. 57

185 I.A. 57

Gen. No. 5141-

October [illegible], 1913-

Filed Dec. 27, 1913-

George [illegible] Weston.,

[illegible]

vs.

J.C. Ross.,

Appellant.,

Appellee.

MCSURLEY, J.

This is an action of assumpsit [illegible] against J.C. Ross [illegible] Ellen Ross for commissions on a sale of real estate. A verdict was [illegible] against [illegible] in the court below for $300.00. The court granted a new trial [illegible] defendant Ellen Ross, [illegible] on the ground that the suit was [illegible], but did not amend the declaration, [illegible] judgment for the amount against appellant, J.C. Ross.

It is insisted [illegible] in [illegible] against appellant on the ground that in actions ex contractu [illegible] two defendants are sued jointly the judgment [illegible] against both, or none.

The declaration consists of [illegible] special counts, [illegible] with the common counts. The three special counts each [illegible] that the defendants, Ellen Ross and J.C. Ross, in June 1912, [illegible] into a verbal agreement with [illegible] to sell in $1.00 [illegible] for selling their 320 acre farm. The [illegible] declarations on both [illegible] between plaintiff and the two defendants jointly. The promises to be sold are charged as being the property of the two defendants jointly. The promise to pay [illegible] commission is charged as having been made by the two defendants jointly. It is [illegible] that in such actions [illegible] plaintiff has right to bring an action against either one of several joint debtors or obligors as he may elect, as there is a separate individual liability on each one of several joint debtors or obligors, and the plaintiff sues more than one of them in the same action, he may dismiss as to some and take judgment as to others, as in the case of joint sureties on a bond.

The rule being that if one of the defendants could have been sued alone in the first instance then the others were not necessary parties, and the liability of the defendant retained in the suit is not thereby increased, because each of the defendants were liable to the plaintiff for the whole amount of the debt. Kasper v. People, 230 Ill. 342.

It is also true that the rule that in a joint action ex contractu, a dismissal as to one defendant effects a discontinuance of the entire action, so as to render a judgment against the remaining defendants erroneous, does not apply where a defense is interposed which is personal to the defendant who makes it, such as infancy, coverture, lunacy, bankruptcy and the like, or where one is joined as a defendant in the action who is an unnecessary or improper defendant. Kasper v. People, supra; Meyer v. Brenninger, 150 Ill. , 110.

But unless the case comes within one of the exceptions above mentioned, when an action is brought on a joint contract the judgment must be rendered against all the defendants, or none. Kingsland v. Koeppe, 137 Ill., 344; Myers v. First National Bank , 85 Ill., 423; Briggs v. Adams, 31 Ill., 486; Grand Pacific Hotel Co. v. Pinkerton, 217 Ill. 1; C. & St.L. R.R.Co. v. Easterly, 89 Ill. 156; Merrifield v. Cottage Piano Co., 238 Ill., 526.

Under the averments of the declaration Ellen Ross was a necessary party. It is apparent , therefore, that the court erred in entering judgment against appellant.

We do not think there was any reversible error in the rulings of the court upon the admission of evidence nor in the giving or refusing of instructions. As the case must be reversed for the error indicated, we will not comment upon the weight of the evidence.

The judgment of the Circuit Court will be reversed and the case remanded.

Oct. Term —
1913 —

M. H. Thompson
Judge.

185 I.A. 58

185 I.A. 58

Gen. No. 6144. October Term, 1913- Agenda No. 6-

Filed Dec. 27, 1913-

Frank Lockett.,
Appellee.

VS. : Appeal from Circuit Court Champaign

Charles Zimmerman.,
Appellant.,

County.

ELDREDGE, J.

This is an appeal from the judgment of the Circuit Court of Champaign County against appellant in the sum of $766.66, in an action of assumpsit by attachment proceedings, the defendant being a resident of Wisconsin. In August, 1911, appellant, who was a farmer in Saline County, entered in to the following agreement with appellee Lockett and one John D. Stayton for the sale of his farm.

"Eldorado, Ill., August 28th, 1911. This agreement made between Charles W. Zimmerman, party of the first part, and John D. Stayton and Frank Lockett, real estate firm, party of the second part Party of the first part agrees to pay party of the second part all above $90.00 per acre and interest for his 230 acres farm if they consumate their sale to Charles A. Tarman of Iroquois County, Ill. Said difference to be paid on March 1st, 1912, at the First National Bank, Eldorado, Ill. If the aforesaid Charles A.Tarman makes his final settlement on that date. Otherwise this agreement is null and void".

Appellee Lockett brought the suit in his own name and in addition- to the common counts there is a special count which, after setting up the aforesaid contract, avers that the farm was not sold to C. Tarman on March 1st, 1912, and that the time for executing the sale was extended until April 1st. 1912, by the defendant and that said sale was consummated through the efforts of said real estate firm, and then avers that by reason of the said purchase the defendant became indebted to the plaintiff and to said

Stayton in the sum of $1725.00, "which by mutual agreement by and between the parties to said contract aforesaid (and entered into after the execution and signing thereof by said parties) was to be paid one-third thereof to the said John D. Stayton and two-thirds thereof to the plaintiff". The count further ~~xxxxx~~ avers that after the closing of the sale of said premises the defendant paid to in full of the amount due him leaving the balance, $1,150.00- said Stayton his one-third share of said $1 ,725.00, due the plaintiff unpaid and the said John D. Stayton now refuses to join in this suit and has no interest in the results of the same. The defendant filed the general issue, also a special plea alleging in substance that the only contract he ever made was the written one referred to; that he never agreed to the extension of said contracts: said contract became null and void by its own terms on the 1st day of March A.D. 1912; that he subsequently sold the farm to said Tarman on the 29th day of March, 1912, aided to a small extent by said Stayton, under a different agreement and contract for sale, and that he paid said Stayton the sum of $250.00. in full payment for the ~~xxxix~~ commission for the sale of said farm; that he never proposed to pay said Lockett any sum or sums of money whatsoever other than as expressed in said written contract and that said promise was made to said firm of Stayton and Lockett as copartners; that he never at any time thereafter had any understanding with said partners, or either of ~~xxx~~ them, as to the division between them of the amount of said commission, and if the said Lockett has any claims upon him whatever it is through the services rendered by his partner Stayton on the 29th day of March, 1912, for which services the defendant has fully paid.

Appellant contends that appellee Lockett cannot maintain this suit in his own name on the ground that the contract was made by appellant with Lockett and Stayton as copartners; that the subsequent agreement alleged in the declaration by which it was sought to modify the written contract by agreeing that the commission was to be paid one-third to Stayton and two-thirds to plaintiff was still an agreement with Stayton and Lockett as copartners and that said subse-

quent agreement did not give each partner a right to bring a separate action for his shareof the commission. Appellee denies that the written contract was executed by Stayton and Lockett as copartners. We cannot agree with counsel for appellee on this proposition The contract itself designates Stayton and Lockett as a "real estate firm". They thus held themselves out to defendant to be partners, at least in the particular business of selling this farm, and are estopped from disclaiming it. Wheeler v. McMahoney, 60 Ill. 358; Chicago Trust & Savings Bank v. Kinnare, 174 Ill., 358.

Primarily it was of no concern whatever to appellant how Lockett and Stayton divided their commission between themselves. But assuming that the parole agreement, as averred in the declaration, is sufficient to charge appellant with a promise to pay Lockett and Stayton severally their alleged portions of said commission, and that there was sufficient consideration for said promise, both of which ~~xxxxxxxxxxxx~~ assumptions are exceedingly doubtful, there is absolutely no evidence in the record to sustain any such agreement. Appellee testifies in substance that about nine months after the written contract had been executed he and a man by the name of Cox called upon appellant at his home and appellee told appellant that Stayton was to get one-third, Cox one-third and appellee one-third, and he further testifies, "I told Mr. Zimmerman that I was to pay Mr. Cox, ~~xxxx~~ one-third of this commission when the deal was closed up". It appears that the witness Cox referred to had been helping Lockett and Stayton in attempting to make the sale of this land. There is nothing in the record to show that appellant agreed to pay the commission ~~xxxxxxxxx~~ in this way, or assented to it in any manner. The mere statement of Lockett to Zimmerman, of the manner in which this commission which he and Stayton were to receive under their contract was to be divided, cannot create a contract liability on Zimmerman to pay Stayton individually one-third thereof and Lockett individually two-thirds thereof. The mere statement of the proposition shows its absurdity.

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The Court gave ~~eleven~~ eleven instructions [illegible] the plaintiff, ten of which are erroneous, and [illegible] to point out all the errors contained in each one [illegible] would prolong this opinion to an unwarrantable length. We will mention the first one, which is as follows;-

"The Court instructs the jury that if you infer from a preponderance of the evidence that the plaintiff and John H. Stayton were employed by the defendant to assist in selling a sale of his farm, with a promise of a certain compensation in case said sale is effected and to assist in bringing about such sale. That plaintiff Frank Lockett is entitled to his compensation or commission, according to such agreement, even though the defendant changed his proposition with a view to dispense with plaintiff's services, then the plaintiff received no notice of such fact".

This instruction ignores the alleged verbal modification of the contract and instructs the jury that the plaintiff can recover in his own individual capacity if they believe from the evidence that the contract was made by defendant with plaintiff and Stayton jointly without any reference to any new promise of the defendant to pay Lockett individually his proportion of the commission. It then assumes that the defendant changed his proposition with a view to dispense with plaintiff's services and assumes that the plaintiff received no notice of such fact. Also one defense was that Lockett and Stayton did not perform their part of the contract and did not consummate the sale, yet this instruction also allows the plaintiff to recover regardless of whether they performed their part of the contract. The only instruction given for the plaintiff which states a correct proposition of law was the fourth.

For the errors indicated, the judgment of the Circuit Court must be reversed and the cause remanded.

Dat. June
1913

N. G. Cochran Jr.

Gen. No. 6166. October Term, A.D. 1913- A.B. 79-

Filed Dec. 27, 1913-

John L. Jenkins, et al.,
Appellants.,

vs. ; Appeal from Circuit Court of

Ida M. Brittin., Admx., et al.,
Appellees- DeWitt County.

MILDREDGE, J.

This is an action brought by appellants, partners doing business as Jenkins Grain Company, against Ida M. Brittin, Administratrix, and Charles L. Britten, Administrator of the Estate of John William Brittin, deceased, to recover damages on a contract for the failure to deliver 2,000 bushels of corn sold by John W. Brittin in his lifetime to the appellants. The jury found the issues in favor of appellants and assessed their damages at $660.00- and judgment was rendered for that amount. The appellants, not being satisfied with that judgment, have prosecuted this appeal.

Appellants own an elevator at Jenkins switch. The evidence shows that J.W.Brown was the agent of the appellants in the buying and selling of the grain and that deceased in his lifetime on the ~~11~~ 12th- day of January , 1911, had a conversation with said Brown, in which he stated that he would sell appellants 2,000 bushels of corn at 40 cents per bushel; that deceased asked Brown if there was any certain time for it to be delivered and Brown said no, but to get it in as quick as he could and that it would be all right if he would get it in as quick as he could. Deceased became ill during the first part of February, and never left his house after March 20th, and died on May 12th. He never delivered the corn to appellants. During the months of February and March the price of corn advanced about two cents per bushel. No demand was ever made upon the deceased in his lifetime for the delivery of the corn by appellants. After his death, in June the evidence for appellants tends to show that a demand was made upon the administratrix to deliver the corn, which this is denied by her. In August, Brown

asked her when she was going to deliver the corn and she said she would not deliver it.

Appellants claim that the breach occurred in August when the administratrix refused to deliver the corn, and at that time the market price of corn had advanced 20 cents over the price that it was contracted for with deceased and that their damages should be fixed as of that date.

The trial court held that the measure of damages was such sum as would represent the difference between the contract price and the market price when a reasonable time for the delivery of the corn had expired, and modified appellants' instruction to that effect.

Where no time of delivery is specified on sale of chattels a reasonable time under all the circumstances will be implied. What was a reasonable time under all the circumstances in this case was a question of fact for the jury to determine. The administrators of the estate had no power to extend the time for the delivery of this corn. It was simply their duty to collect the assets and pay the debts of the deceased, and they had no power or authority to modify the terms of the contract made by the deceased. The evidence of any conversations by the administrators, or either of them, tended to recognize the validity of the contract or varying the ~~terms~~ terms thereof was competent. After the time for the performance of a contract has passed any arrangement made between the parties for the performance of the contract at a different time is not binding unless supported by a new consideration. Clove Drawing Co. v. American Malting Co., 247 Ill. 622.

The jury in this case evidently found the reasonable time for the delivery of this corn was in March and assessed appellants' damages at two cents per bushel. We think this verdict was warranted by the evidence and that the trial court held properly in the measure of damages.

The judgment will therefore be affirmed.

Mr. Justice Philbrick took no part in the consideration of this case.

Oct - Term
1913 —

S. Philbrick - J —

185 A 68

185 I.A. 68

Gen. No. 6017

[illegible]

Filed Dec. 27, 1913.

[illegible] Threshing Machine Co.,
Appellant,
vs.
Vernon [illegible], Appellee.

[illegible] Appeal from [illegible] County.

Opinion by
Thompson, [illegible]

This is an action [illegible] Threshing Machine Company against Vernon [illegible]. The plaintiff seeks to recover the balance of an alleged [illegible] of sort in notes executed by J. [illegible] Henderson Jr. to the defendant, which were secured by chattel mortgages. The defendant admitted [illegible] agreed to pay $[illegible].34 for the notes and mortgages [illegible] the notes and mortgages to the defendant and [illegible] them they were foreclosed by plaintiff. The net proceeds [illegible] foreclosure were $155.70. Henderson is insolvent and [illegible] this suit to recover $333.74 the full [illegible] agreed to pay for the notes and mortgages. The defendant [illegible] never made a contract to purchase the notes and mortgages. The jury returned a verdict for the defendant on which judgment was rendered [illegible] plaintiff appeals.

On September 8, 1910, J. [illegible] Henderson Jr. of [illegible], Illinois executed to the Nichols-Shepard Co. a chattel mortgage [illegible] Shepard traction engine, cornsheller and outfit, and [illegible] to secure the payment of a note for $[illegible]. On November [illegible], 1910, [illegible] Henderson purchased from appellee a hay baler [illegible] notes therefor with J. O. Henderson as surety; the notes provide that [illegible] the hay baler shall remain in appellee until the notes are [illegible]. On February [illegible], 1911, the appellant took from J. [illegible] Henderson Jr. a chattel mortgage upon a [illegible] sheller, the hay baler [illegible] to secure an indebtedness of $500 evidenced by five notes of $100 each.

On August 1, 1911, appellant extended two of the notes and took another chattel mortgage on the property covered by the mortgage of February 6, 1911, and including also the property covered by the Nichol - Shepard mortgage to secure the same five notes; the second mortgage is additional security and provides that the mortgage of February 6, 1911, remains in full force. All these chattel mortgages were duly acknowledged and recorded at their respective dates. In September 1911, a judgment was rendered in the circuit court of DeWitt county against J. A. Henderson Jr. for 730.46 on which execution was ha issued and Henderson filed a debtor's schedule listing the mortgaged property and some household goods and claimed his statutory exemptions.

W. Darnell, who resides in Peoria and is a collection agent for appellant, testified that he first met appellee in Springfield, September 2 , 1911; that while re re outing appellant he had learned that appellee had an unrecorded mortgage against Henderson; that he attempted to communicate from Peoria with appellee at Shelbyville over the telephone and learned that he was in Springfield; that he Darnell, went to Springfield, found out where appellee was staying, hunted him up and told him that he had learned that he, appellee, had an unrecorded mortgage and "asked Mr. Tallman if he would consider a proposition to buy our claim and we make an assignment of our mortgage to him, he said to me "I have been up there and I have looked the matter over', I said I have got a copy here or a description of the indebtedness' and he said 'I have too". He further testified that he had memoranda of the appellant's and the Nichols-Shepard mortgages there, and that appellee examined them and that appellee also had copies of his own of these mortgages; that he read to appellee the clause in appellant's mortgage covenanting that the mortgagor was lawfully possessed as of his own property of the property described in the mortgage and that it was

"free from the [illegible] and [illegible] legal claims [illegible]", [illegible] that appellee [illegible] at first [illegible], [illegible] there was a legal mortgage [illegible] of it; that appellee [illegible] the attorney [illegible] him at Clinton [illegible] that appellee [illegible] Bittner, his attorney, [illegible] that Mr. Darnell, [illegible] up the amount due on the five notes and that appellee would send to the J. I. Case people [illegible] "free and clear" in blank, and that he would [illegible] principal of the notes in full with interest at seven per cent to October [illegible], and [illegible] forward a draft for the full amount to appellant at Peoria and that the witness accepted appellee's offer. [illegible] further testified that on October 9, he told appellee over the telephone that he had the assignment of the notes and was ready to deliver to him and that appellee replied that he would not take the notes and that [illegible] of appellant and that this conversation [illegible] October 10, substantially repeated over the telephone. On October [illegible] Darnell [illegible] appellee at Shelbyville and they met or went to Shelby to see if they could find a purchaser for the corn sheller.

Appellee testified that he had no information about the Nichols-Shepard mortgage at the principal meeting, and that at that meeting he said he would take the notes with the attorney; that Darnell met him and Bittner, at Clinton on October 9, and they discussed the value of the mortgaged property; that he did not know of the Nichols-Shepard mortgage at that time and that although they saw the mortgages of appellant they did not [illegible] the [illegible] in it "except legal claims now of record"; that he did not tell Darnell that he would take the notes and mortgages, and that he did not give him a definite answer, that his attorney advised him to accept

Darnell's offer but that [illegible], appellee [illegible] to do it. Witness testified that [illegible] never [illegible] to take appellee's notes and mortgages.

Mr. Bitter, the attorney for [illegible], testified that he and appellee examined the record [illegible] morning of October [illegible], 1911, but that [illegible] the Nicholls-Shepard mortgage [illegible]; that he and appellee met Darnell in Hamilton on October [illegible], when Darnell did not have the notes but had one of appellee's [illegible] and wanted appellee to take Darnell's notes and mortgages, that Darnell said to appellee that "there wouldn't any trouble about Hallman being able to pay off, if you'll take those mortgages off mine" that he said [illegible] worth $500, an engine worth [illegible], that Darnell stated the amount but the witness did not remember the amount [illegible], corn sheller as good as new, worth $50, [illegible] sell it to them and pay us off and have your log [illegible] clear, that the wagon and corn sheller at a forced sale would [illegible] dollars, that appellee said, if he were sure [illegible] he wouldn't hesitate; that Darnell went over the notes again and the witness said to appellee that it looked good to him and that if he did like doing it he could give his check for the amount and appellee said "I want to wait awhile, I am not satisfied, I want to investigate the matter", and Bitter then said to Darnell that he would get the notes and have them endorsed so that when appellee was ready they could close it up. Bitter testified that Darnell had Darnell and's mortgage there and the witness looked at the signature, who was the mortgagee, and the description of the property, but did not read the remainder of the mortgage and it was not read by Darnell and that nothing was said about a Nicholls-Shepard mortgage. The evidence of Bitter was to that

occurred on the meeting of October 4, immediately by a letter he wrote to appellant October 11, in which he stated he was present when appellee talked to Darnell and proved to be by officer Allnatt's mortgage, but he did not know of the prior mortgage covering all the property except the corn sheller.

After the conversation on October 4, Darnell forwarded appellant's mortgages to his principal for an assignment and appellee the same day went to Anderson at Conway and had the hay baler shipped to Shelbyville and endorsed a credit of $291.50 on the notes he held against Henderson dating the credit September 7, 1911. Appellee, when he was shipping the hay baler, learned from Henderson of the Nichols-Shepard mortgage and returned to Clinton to investigate about it. The appellant on October 6 executed an assignment of its two mortgages and notes and forwarded them to Darnell. On October 4, Whittaker wrote a letter to Darnell stating he had discovered the Nichols-Shepard mortgage and that he supposed Darnell did not know that it was a prior lien on the engine and horses; that he "did not know what to do under the circumstances, but we are not looking to take any advantage of you, but want to find out where we are at before we start." In March 1912 the Nichols-Shepard Co. foreclosed their mortgage and the appellant foreclosed its mortgages, and sustained a loss of $366.74 on the amount due October 2, 1911.

The evidence is in direct conflict. The appellant began the negotiations for the sale of its notes and mortgages. Appellee after the conversation of October 4, 1911, did investigate and try to find out for what sums he could find purchasers for the horses and machinery but that was consistent with his statement that he wanted to investigate further before agreeing

to buy the notes and mortgages. The [illegible] to Shelbyville was authorized by the secretary [illegible] and his agreement with lender [illegible], but [illegible] of appellant's mortgages. The evidence of appellant's witness, Darnell, as to what occurred at the meeting on October [illegible], is contradicted by that of appellee and others. It was a question for the jury to decide to whom they would give credit, and their finding, having been approved by the trial court, should not be disturbed by an appellate court unless some error of law occurred at the trial which requires a reversal.

During the examination of appellee he was asked what was the reason for wanting to investigate further before bringing appellant's notes and mortgages and answered: "His over anxiety from the start to the English for me to take a hold of them." This answer was excluded by the court. In argument to the jury, counsel for appellee commented on the anxiety of Darnell to have appellee buy the notes and mortgages. The evidence shows that Darnell first telephoned to appellee, then went to Brinkfield to hunt him up to try to sell him the notes, telephoned to him twice after he admits appellee told him he would not take the notes, and a few days after appellee told him he would not take the notes again went to Shelbyville to see him and went with him to see if they could find a purchaser for the property covered by appellant's mortgages. The argument was not commenting on the excluded evidence, but was argument based on the acts of Darnell and inferences legitimately deduced therefrom. There was no error in the argument.

It is also insisted that the court erred in giving duplicate instructions. The sixth instruction is an abstract proposition of law telling the jury that to constitute a sale of personal property for future delivery the minds of the two

parties must meet and agree on the terms of the contract [illegible] anything is left open for future negotiation [illegible] settlement there is no contract to enforce. [illegible] is the concrete application of the [illegible] instruction, and tells the jury [illegible] preponderance of the evidence [illegible] the terms and conditions of the alleged [illegible] in question, then the plaintiff is [illegible] recover. The appellant's second, fifth and seventh [illegible] of appellant's [illegible] of the [illegible] language, that if they from the evidence believed [illegible] to buy the notes on [illegible] to carry out the contract, then appellant is entitled to recover [illegible] shown by the evidence.

The instructions [illegible] while the appellee's [illegible] could not, when the [illegible] of appellant's instructions is considered, have been misled by it. [illegible] reversible error in the case the judgment is affirmed.

Affirmed.

Jesus

1913 –

J. C. McBride

J –

185 I.A. 78

185 I.A. 78

577

[illegible] n. No. 20.1-

Filed Dec. 27, 1913-

[illegible] ation,

[illegible]

v.

[illegible]

[illegible] ott.,

[illegible]

Thomson, J.-

[illegible] in [illegible] court of [illegible] county, [illegible] to [illegible] for the [illegible] of [illegible] section [illegible] way, under [illegible] of Chapter 142 [illegible] Revised Statutes. [illegible] ways [illegible] to [illegible] said [illegible] side of [illegible] of number [illegible] road.

[illegible] ce. [illegible] av rs that the [illegible] nt ob[illegible] d [illegible] ht-of-way [illegible] Mattoon on the section line between [illegible] eighteen and between sections [illegible] y, [illegible] of the said road [illegible] the section line [illegible] .B. [illegible] son, county surveyor, as shown by [illegible] the said [illegible] son filed with an order now on file in [illegible] Clerk, by constructing a fence on the west half of the said [illegible] y. The second count describes the [illegible] of the road [illegible] line. The third count describes [illegible] the center [illegible] section line as established by Mattoon in [illegible] forth [illegible] proceedings establishing the road in November, 1901. The order [illegible] that the road as set forth in the [illegible] count [illegible] that the [illegible] road is the section line between said sections.

The defendant filed a special plea averring that a petition signed by a number of land owners residing in said town was presented to the commissioners of highways [illegible] said town representing that the exact location of the road is uncertain and the subject of dispute and requesting that a competent surveyor be employed to resurvey and make a plat thereof; that the commissioners of highways examined the same and found that it was signed by twelve land owners and that the exact location of said road is

uncertain [illegible] been in [illegible] that it is [illegible] prayer of [illegible] petition [illegible]; that [illegible] public highways [illegible] the surveyors [illegible] survey [illegible] the commissioners of highways [illegible] surveyors and order said road [illegible] out by the surveyors; but [illegible] the fence on the west boundary line of said [illegible] not on any other and [illegible] claiming that the road was [illegible] and in the resurvey in [illegible] for the placing of said fence on said line. [illegible] to this plea. The demurrer was overruled and [illegible] its demurrer judgment nil capit was entered. The plaintiff prosecutes this writ of error to review that judgment.

The only question presented is [illegible] or not [illegible] stoon by the resurvey and fixing of the west line of the highway in question is estopped to prosecute a suit to recover a penalty for the defendant for building a fence on the line which was thus established as the boundary of the road. The doctrine of estoppel in pais applies to municipal corporations but the public will only be estopped or not as justice may require. Martel vs. City of East St. Louis, 94 Ill., 67; Roby vs. City of Chicago, 68 Ill., 447; Supervisors vs. City of Lincoln, 81 Ill., 156; [illegible] vs. Union Gas Co., 254 Ill. 395 (at p. 417); City of Chicago vs. [illegible]-burg C.C. & St.L. R.R., [illegible] Ill., 220.

The commissioners of highways represent the town and under the Statute, Section 37 Chapter 121, it is their duty on the petition of twelve land owners to employ a surveyor and have any road designated in such petition resurveyed, when the exact location of such road is uncertain. "This was not a proceeding to establish a road, but only to ascertain the courses and distances of one claimed to be already established. This proceeding did not establish or prove anything, but that the commissioners claimed that a

road existed [illegible] survey [illegible] line. [illegible] of its existence exactly as it [illegible] of estopping the public from [illegible] different line from the survey". [illegible] v. [illegible], [illegible] Ill., [illegible].

The resurvey made on the [illegible] the approval of the survey by [illegible] constitute [illegible] admission that the line established by that resurvey is the line of the road and estops the [illegible] the line. Shields vs. Ness, 158 Ill., [illegible]. If there was no error in [illegible] the demurrer [illegible] and the judgment is affirmed.

[illegible]

1913 —

Gen. No. 6095- October Term, 1913-

Filed Dec. 27- 1913-

Thomas P. Cochran.,
Appellee-

vs. ; Appeal from Cook.

City of Charleston,
Appellant.

Thompson, J.

This is an action on the case begun by Thomas P. Cochran against the City of Charleston, to recover for personal injuries sustained by plaintiff averred to have been caused by the negligence of the defendant. Upon a trial before a jury a verdict was returned awarding plaintiff, ~~$2,xx~~ $2,800. damages on which judgment was rendered.

The declaration contains three counts in each of which it is averred it was the ~~duty~~ duty of the appellee to use reasonable care to keep its sidewalks on a certain public street, in good and safe repair, yet the defendant not regarding its duty negligently suffered the sidewalk to be and remain in bad and unsafe repair in this etc-

The evidence for appellee shows that the city excavated a hole in the boulevard between a cement sidewalk and the curb by the side of the pavement; that the hole was parallel with the sidewalk, and about six feet long, two feet wide and six feet deep and that the appellee while passing along on the sidewalk before daylight, before six o'clock on the morning of December 30, 1912, stepped into the hole and was injured, and that there was neither any light or warning by the hole nor any covering over it.

The evidence for appellant shows that the hole was excavated by the city down to a sewer, that it was three and a half feet deep and twenty to twenty two inches wide, that the city employes covered the hole with oak timbers two inches thick and four inches wide, the evening before the acci-dent, and placed a red light on the pile of dirt by the side of the hole for the purpose of warning travellers of the condition of the street, and that the lantern was burning after the appellee claims he stepped into the hole.

[illegible] injury, [illegible] bruises; [illegible] ed [illegible] arly excessive.

[illegible] duty [illegible] use reasonable care to keep its streets [illegible] fourth instruction given at the request [illegible] tells the jury, that it was the duty of the city to put a guard [illegible] travellers of the dangerous condition of its streets, [illegible] such [illegible] so as to make the street reasonably safe for travel, and if the city failed to do so, and by reason [illegible] in the exercise of due care, was injured, [illegible] be liable [illegible] sustained. The [illegible] sixth and eleventh instructions tell the jury in substance that if it [illegible] the plaintiff was injured [illegible] count thereof [illegible] defendant was guilty [illegible] charged in the declaration or any count thereof, [illegible] should be for [illegible] plaintiff. The declaration avers [illegible] city to be greater than the law requires. It requires the city to use reasonable care to keep its streets absolutely safe, while the law only requires a city to use reasonable care to keep its streets reasonably safe for travel. City of Peoria vs. [illegible], 217 Ill., 185; Solway vs. City of Chicago, 239 Ill., 436.

The instructions are erroneous in some of them stating a positive duty of the city to make its streets reasonably safe and [illegible] in stating it was the duty of the city to use reasonable care to make its streets safe. The requirement of reasonable care by the city to make its streets reasonably safe should be in each instruction inasmuch as the declaration avers the duty greater than the law requires. For the reasons indicated the judgment is reversed and the cause remanded.

Reversed and Remanded.

Oct-Term
1913 -

E. R. E.
Kinnaugh J.

185 I.A. 82

185 A 82

672

Gen. No. 101. October Term, 1913-

Filed Dec. 27, 1913-

The W.T.Rawleigh Medical Co.,
~~Defendant in Error~~
appellee

VS.

J.W.Barnett,
~~Plaintiff in Error~~
appellant

Circuit Court of

Thompson, J.

The W.T.Rawleigh Medical Company, [illegible], brought suit in assumpsit against J.W.Barnett. The declaration consists of a count upon a promissory note for $[illegible].00- dated March 1, 1905, with the common counts. The defendant pleaded the general issue with notice of set off, and a special plea of total failure of consideration. The special plea was amended in June, 1912, and as amended avers that the several supposed causes of action in the declaration mentioned are one and the same, namely the note in the said declaration mentioned, and that the note was given for a release of the defendant by the plaintiff from a void contract. It pleadsthe said contract, which is dated March , 1904, and is an agreement by the plaintiff to furnish to one D.N. [illegible], its salesman, medicines and goods at wholesale prices [illegible] to be charged to said salesman and for which the salesman agrees to pay in a certain manner, and expires by limitation March 1, 1905. It is signed by plaintiff and the salesman, and following the signatures of the parties is a guaranty, which recitesthat "In consideration of the appointment of the above named person as salesman we guarantee to the payment of any balance due from him to said W.T.Rawleigh Medical Company and remaining unpaid, upon its books at the date of the acceptance of this contract" and upon its termination from any cause the immediate payment of any balance due said plaintiff not exceeding five hundred dollars. The guaranty is signed by J.W. Barnett and two other parties. On the back of the contract are a number of conditions and an endorsement "accepted May 16, 1904". The plea sets out the contract, the guaranty and the conditions on the back of the contract in haec verba. The plea further avers

that Wood at the time the contract was executed was indebted to plaintiff in over the sum of five hundred dollars and that fact was not disclosed to defendant, and that the defendant did not have knowledge of the existence of the indebtedness at the time the guaranty was signed nor until long after he executed said note; that the contract was signed by plaintiff and Wood on March 1, 1904, and that the guaranty was not signed by the defendant until long after that date; that such contract of surety was signed by the defendant at the request of Wood and not at the request of plaintiff, and at the time said contract of guaranty was signed there was no agent of plaintiff corporation present except the said Wood; that the defendant in signing said contract of guaranty merely offered himself as surety for said Wood and this defendant was never notified by the plaintiff that it accepted him as guarantor or surety; that this defendant never had any knowledge that he had been accepted as a guarantor on said contract, until after said Wood had defaulted under the terms of the contract as hereinbefore set forth; that said Wood was not appointed as a salesman of plaintiff in consideration of this defendant signing said contract of guaranty and that said Wood was at the time defendant signed said contract a salesman of plaintiff. The plea further avers that because the said debt was contracted long before said contract was made and because the defendant was never notified or had any knowledge that he was accepted under said contract, and because said Wood was not appointed salesman for plaintiff in consideration of the signing of said guaranty by this defendant, said contract of guaranty was void, of no effect and not binding on this defendant; that the only consideration for the signing of said supposed note was the said void contract of guaranty and said contract was not a good or valuable consideration for said note and said note was without any good and valuable consideration and this the defendant is ready to verify.

The plaintiff demurred to the special plea. The court sustained the demurrer. The cause was then heard by the court and judgment rendered in favor of plaintiff for the balance remaining unpaid on the note.

The defendant assigns error on the ruling of the court on the demurrer to the special plea. While the plea is inartificially drawn, contains much repetition and surplusage, and is bad for duplicity if that question had been properly raised, the substance of the plea is that there was no consideration for the note that the supposed consideration was a release of the defendant from a void contract; and that the contract of guaranty was void in this, that it was signed at the request of the salesman, Wood, after the contract between Wood and plaintiff had been executed and that it, the contract of guaranty, was not a binding contract until plaintiff notified defendant that it accepted the guaranty and that it never did notify the defendant that it accepted the guaranty until after Wood had defaulted under the principal contract.

One defence urged in the plea is that Wood at the time the contract was signed, was indebted to plaintiff in the sum of over five hundred dollars, and that that fact was not disclosed to defendant and avers that defendant was not bound in law to pay the indebtedness for which said note was given. The contract of warranty binds the defendant to pay any balance due from Wood and remaining unpaid upon its books at the date of the acceptance of the contract and waives all right to notice as to the account of said Wood but provides that the defendant is entitled ~~xxxx~~ upon request to a full statement of the condition. It is clear that the part of the plea ~~xxxxxx~~ setting up an indebtedness at the time the contract was executed did not ~~xxx~~ set up a valid defence.

Another defence urged is that the instrument signed by defendant was only an offer of guaranty and that there was no notice of the acceptance of the offer of guaranty. The contract of guaranty is written on the same paper as the contract of employment and under the contract of employment. Wood's name is not mentioned in the guaranty contract, which begins by stating "In consideration of the appointment of the above named person as salesman we hereby guarante" etc. the payment of any balance due him, and upon the termination of

the contract of employment which ran until March 1, 1905, the immediate payment of any balance etc., and waives all right to notice as to the account of said salesman.

This suit is not one to recover on the contract of guaranty but to recover on a note given by the guarantor to the [illegible] after the time for which the supposed guaranty was given had expired. It may be a question whether any recovery could be had in a suit upon the guaranty. The defendant pleads that the note was given for a release from the guaranty. The plea, while it pleads evidence and conclusions ~~xxx~~ does not plead any fact as to how the note was given. The averment is that the note was given for a release from the contract and then pleads the supposed contract but does not aver any facts constituting the release. The statement of a release is merely a statement of a conclusion. The facts, if any, which constitute the supposed release should be stated that the court may determine whether it was or not ~~xxx~~ given for a release as averred. The demurrer is special on that question and there was no error in sustaining it.

It is also assigned for error that the court erred in overruling a motion for a continuance. There is no motion for a continuance or showing thereon in the bill of exceptions, hence that question is not preserved for review.

The demurrer to the special amended plea was sustained November 18, 1912. In December, after the case was set for trial the defendant moved for leave to file three additional pleas. This motion was overruled and defendant insists this was error. The pleas were the same in substance as the amended additional plea. The defendant should have made his application to file additional pleas before the case was called for trial so that the plaintiff would not be taken by surprise or the business of the court delayed. City of Chicago vvs. Cook, 204 Ill., 575; Low vs. Blake, 148 Ill., 76. The application was addressed to the discretion of the court and we do not see any reason why the defendant should be permitted to cause a continuance by reason of his dilatoryness.

We cannot say the ruling of the court was erroneous. Finding no error in the case the judgment is affirmed.

A F F I R M E D.

Mr. Justice Phillbrick took no part in this decision.

Oct - Term -
1913 - -

S. Philbrick - J -

185 I.A. 83
185 A

Gen. No. 6107. October Term, 1913- Ag. No. 17-
Filed Dec. 27-1913-

Joseph W. Johnson.,
Appellee-

VS. ; Appeal from Vermilion.

Danville, Urbana and Champaign
Ry. Co.,-
Appellant-

Thompson, J.-

This is an appeal by the defendant from a judgment for $2500. against it for personal injuries sustained by the plaintiff.

The plaintiff, a truck farmer, while driving along a public highway on his way to Urbana, was struck by a telephone pole which the employes of defendant were lowering by means of ropes and pulleys attached to a new pole after the pole which struck defendant had been cut off at the ground. The plaintiff while sitting in his wagon, seeing the pole, which had been lowered to within a few feet of the ground, swinging in a circle towards him, put his foot forward to keep it from striking his body. It struck his heel and knocked him from his seat into the back end of his wagon injuring him.

It is insisted that there was error in permitting plaintiff to testify what he could earn in his business. Upon his direct examination the question was asked:- "Well, about what could you earn approximately at your business one year with another one"? An objection was overruled and plaintiff answered, $1500. The declaration contains an averment that because of the negligence of the defendant he is permanently injured and hindered and prevented from transacting his affairs and ordinary business. "The rule deducible from the cases in this state is that in order to recover compensation for inability to work at plaintiff's ordinary and usual employment or business all that is necessary in the declaration is the general averement of such inability, caused by the injury and consequent loss and damage, and that proof of his particular employment or

business and of his ordinary wages and earnings therein is admissible in evidence under such general averment". C. & E.R.R.Co. vs. Meech, 163 Ill . 305; Barnes vs. Danville Street Ry. Co. 235 Ill. 571; Union Traction Co. vs. Brethauer, 223 Ill. ,521. The question is improper in that it asked how much he could have earned; it should have asked how much did you earn. It was proper for him to tell what his earnings were, but he should not , however, be permitted to guess what he might have earned. The objection to the question should have been sustained because of its form.

Dr. Finch, an expert witness, who had never treated the plaintiff but had taken a radiograph of plaintiff's foot was permitted to testify that he had heard the testimony of the plaintiff, as to how he had been injured, and over objection testified that in his opinion as a physician from plaintiff's description of the accident as to how he received his injury that said accident would have caused the injury shown by the radiograph. Dr. Burris the attending physician testified also basing his opinion on the testimony of plaintiff. There was no dispute over the manner in which the plaintiff was injured, the only contention was over the extent of the injury and as to its permanency. "Opinion evidence is admissible only upon subjects not within the knowledge of men of ordinary experience, and upon the ground that the facts are of such a nature, that they cannot be presented in such a manner that jurors of ordinary intelligence and experience in the affairs of life can appreciate them in their relations and comprehend them sufficiently to form accurate opinions and draw correct inferences from them on which to base intelligent judgments. The opinions of witnesses should not be received as evidence, where all the facts on which such opinions are founded can be ascertained and made intelligible to the jury". Yarger vs. C. & A. RY.Co., 235 Ill. 589; Hoffman vs. Tosetti Brewing Co., 257 Ill., 185. The questions should have been put hypothetically and the jury have been left to make the application of the evidence , if they found the evidence justified the statements

made as a basis for the hypothetical questions. The questions as asked also permitted the witnesses to usurp the province of the jury, Schlauder vs. Chicago & So., Traction Co., 253 Ill. 154. However as there was no controversy over the manner of the injury, we do not hold that the questions put to the physicians and their answers were of themselves reversible error.

It is argued that the third instruction, which was concerning the measure of damages is erroneous. It told the jury that if the jury believed from the evidence that plaintiff "was injured in his ability to labor and attend to his affairs and generally pursue the course of life he might otherwise have done as well since as before the injury" and that such injuries were inflicted through the negligence of defendant's employes as alleged and that plaintiff was in the exercise of due care "then the jury may assess such damages as will compensate said Johnson for all the loss he may have sustained that is a necessary result of such injuries, if the evidence shows he sustained any loss as a result of such injuries".

Defendant contends that the phrase "and generally pursue the course of life he might otherwise have done" authorizes the jury to speculate on the damages sustained by plaintiff without regard to a purpose to follow the occupation he was then engaged in but in following some other occupation, he was not engaged in and not shown by the evidence to have been his intention to pursue and that the last part of the instruction does not confine the jury in its assessment of damages to the evidence on the question of damages.

The jury had the right to consider what effect, if any, the plaintiffs injuries will have on him in the future in regard to his power to earn money by his labor, but they should not be permitted to speculate upon anything he might do that is not based upon or shown by the evidence. While it is not necessary that a witness should testify to the amount of damages that would compensate him for his pain, suffering and inability if any to labor as formerly, yet the jury must base their verdict on the evidence.

In cases of this character the damages are to be determined by the jury from the evidence viewed in the light of their judgment and experience in the affairs of life, and they should be restrained by the instruction to the evidence in the case showing or tending to show the damages. Chicago City Ry. Co., vs. Mead, 206, Ill. 174; C.C.C. & ST.L. RY.Co. vs. Jenkins, 174 Ill.,398; Chicago & Milwaukee El. Ry. vs. Kremple, 116 Ill., App. 253; Ill. Cent. R.R.Co. vs. Farrell, 86 Ill.,App. 436. The instruction was erroneous in not confining the jury in their assessment of damages to the evidence on the question of damages.

For the errors indicated the judgment is reversed and the cause remanded.

Reversed and Remanded-

Oct-Term-
1913-

E. R. E. Kimbrough
J.

185 I.A. 85

185 A 83

Gen. No. 6115- Debt [illegible]

Filed Dec. 27, 1913-

W.W. Cooper,
Appellee-

vs. ; [illegible] from [illegible].

Edna Thoma.,
Appellant-

THOMPSON, J.

The complainant filed a bill to foreclose a mechanic's lien for the sum of $590.70- The defendant answered [illegible] all the allegations of the bill. The cause was referred to a special master to report the evidence with his findings of fact. The master reported the evidence with a finding that the complainant was entitled to a lien for $41[illegible].00- The defendant filed exceptions to the report of the master. When the taking of evidence was begun the defendant made a tender of $256.5[illegible] cents at the time, thereby admitting that sum to be due complainant. When the report of the master was filed, the defendant made a tender as part payment and upon the hearing before the court the report of the master was approved and a decree rendered in favor of complainant for the balance $176.[illegible]- The defendant appeals.

There is no question of law involved in this case, only questions of fact are presented, and as to them the evidence is conflicting and without any clear preponderance either way.

The evidence shows that the defendant, by her authorized agent, made a verbal contract with the complainant, who is a contractor and builder, to remodel and repair a house on her farm.

The evidence of defendant shows that a copy of it was made between the parties to the remodeling of the house, but tends to show that complainant was not authorized to buy material to be used in such work at his own expense, but was authorized to buy it and have it charged to defendant. It also tends to show that the complainant and his men were to have forty cents an hour for their work. The defendant also insists that the complainant did not furnish as many hours work as it claimed by complainant.

The evidence for complainant is that he and his men were to receive forty cents an hour and their board and lodging and that nothing was said about who was to furnish the material further than that he had the contract of remodeling the house. A review of all the evidence sustains the finding that the complainant furnished and paid for labor to the amount of $396, at forty cents an hour without including anything for board and lodging, mill work and flooring $57.85, and miscellaneous expenses $14.09- amounting in all to the sum of $469.19 on which the defendant is entitled to a credit of $55.19 in addition to the amount tendered leaving a balance of $176.81. due. The evidence sustains the decree and it is affirmed-

A F F I R M E D.

1913 –

J. C. McBride –

J –

185 I.A. 86

185 A 86

Gen. No. 6118- October Term, 1913- Ag. No. 86-

Filed Dec. 27, 1913-

B.B.Minor,
Appellee-

vs. ; Appeal from Williams.

William Lynch.,
Appellant.,

Thompson, J.

The plaintiff brought suit against defendant in assumpsit to recover a balance claimed to be due him. A verdict was returned in favor of plaintiff for $179.94 on which judgment was rendered and the defendant appeals.

The plaintiff resides at Indianapolis and ran an elevator and bought grain at Muncie, Illinois, where defendant lives, runs a store and operates a farm from which for several years he had sold grain to appellee. The appellee did not personally attend to his business at Muncie; it was run for him by an agent named Purnell until his death in 1912, before the beginning of this suit. The appellee kept an account at the First National Bank of Danville, Illinois, and Purnell had authority to draw checks against this account in the conducting of appellee's business.

The items in dispute are (1) an item of $37., being a difference in the price of 222 bushels of corn sold to appellee in May 1912, which appellee credited to appellant at 45 cents per bushel and which appellant claims should have been credited to him at 62 cents per bushel, (2) several interest charges on the books of appellee against appellant amounting to $111.30- and (3) eight checks, amounting to $212.00 drawn to appellant and endorsed and cashed by him, and for which it is claimed by appellant that he paid cash to appellee's agent but which appellee claims were checks drawn as advances by his agent without any authority.

Appellee insists that the court erred in admitting in evidence the books of account of appellee. The court did not admit the entries of interest charged nor the balance shown. The books were admitted to show the running account between the parties.

Appellant contends that proper [illegible] injury proof [illegible] to make the books admissible in evidence. [illegible] the books were kept by Purnell, a [illegible] person, [illegible] is [illegible], in the usual course of trade [illegible] of his business and [illegible] lee. This was all the foundation [illegible] to receive [illegible] the books in evidence. [illegible] proper evidence of the [illegible] there was no error in their admission.

It is also insisted [illegible] in evidence the checks [illegible] by appellee [illegible] advances or loans and drawn by Purnell [illegible]. The evidence disclosed that at times [illegible] or when Purnell needed money to pay help and other expenses in [illegible] business that he had Lynch cash checks for him. The evidence also showed that appellee knew of his method of Purnell getting checks cashed, and while he remonstrated with Purnell against the cashing checks in that manner, he still permitted his [illegible] practice and gave no notice to third parties not to cash such checks. The appellant testified that he received advances at times on grain sold by him to appellee before [illegible] and no payments appear to have been made except by checks. While we see no legal objection to the admission of the checks in evidence, still a recovery could not be had against appellant on such checks with the entries on the books concerning the [illegible] there was evidence tending to show that the checks were loans or advances to appellant. A check alone is not evidence of an indebtedness of the payee to the drawer of the check, but presumptively is evidence of the payment of a debt to the payee, or [illegible] paid to it at the time. Kinahan vs. Bullard, 151 Ill., App. 499; McDonald v. Barrett, 148 Ill., App. 414. These checks were corroborative of the books, and were proper evidence to be considered by the jury together with all the other evidence in the case in determining the question of whether or not appellant was indebted to appellee.

[illegible] was permitted over objection to testify [illegible] checked over Burnell's monthly statements to [illegible] and compared them [illegible] books of account in evidence with such [illegible] and found the books of account to be correct. A motion to strike [illegible] testimony was also overruled. There is not proof of evidence which [illegible] books of account to be verified in such manner. [illegible] agent to his principal on the comparison of the statements with the books of account was incompetent testimony and its admission was reversible error.

The appellee was permitted to testify that he [illegible] interest at the rate of seven per cent to the bank [illegible] charged his customers interest at seven per cent, and that there was a custom between him and his customers at Lincoln by which he advanced money on grain with the understanding that they would pay interest on the advances until the grain was delivered. A custom to become controlling so as to affect the rights and liabilities of parties in their dealings with each other must be shown to be certain, continuous, well known, and so well known as to indicate the belief that the parties contracted with reference to it. Hall of Commerce v. Miller, 105 Ill., App. 224. It is like the rule that a custom cannot prevail against a settled rule of law. Entwhistle vs. Henke, 133 Ill. App. 572. The objection should have been sustained to the evidence offered by appellee on the question of his custom as to interest.

The appellee offered in evidence an indemnity bond given him by Burnell for the purpose of showing the extent of the agency. It recites that it was given pursuant to an agreement entered into by them. It was not competent for the purpose offered since it did not pretend to be the agency agreement between the parties. The agent does not appear to have acted beyond the scope of his authority. The appellee sought by this action to recover money which he insists had been advanced to appellant by checks for which appellant paid nothing but with which he charged appellant on his books.

The second and fourth instructions given for appellee told the jury that if they believed from the evidence that a written notice posted in appellee's elevator at Joplin that all money advanced on grain would draw interest, and that the appellant knew of such notice before receiving any money as an advance on grain, and that the appellant did receive any such money, he would be bound by such notice and would be liable to appellee for interest not exceeding seven per cent on all such money advanced. The fourth told the jury that if it was the custom of appellee to charge interest at seven per cent upon such money and charge appellant at that rate for money, if any, advanced..

The statute fixes the rate of interest at six per cent on loans unless the contract is in writing and the contracting parties may stipulate for any rate not exceeding seven per cent. The instruction was erroneous and misleading.

For the errors indicated the judgment is reversed and the cause remanded.

Reversed and Remanded.

1913 –

S. R. E.

Kimbrough Jr –

No. 6124. October Term, 1913- Adv. No. 29-

Filed Dec. 27, 1913-

John Doak,
Appelant.,

vs. ; Appeal from Edgar.

Clyde Rhoads.,
Appellee.

Thompson, J.

This is a proceeding begun by John Doak against Clyde Rhoads by a distress warrant to collect $300. rent claimed to be due plaintiff for the year 1912, for a farm of 340 acres, except a tract of fifteen acres, known as the sugar camp pasture, which Doak reserved. The contract of leasing was verbal and was that Rhoads should keep the fences on the farm in repair, pay five dollars per acre for forty three acres of pasture land and deliver to Doak half the grain and hay raised on the farm. Rhoads was to clear eighteen acres of land that was covered with brush and timber, haul tile to drain the land that he was to ~~xx~~ clear, fill the ditches after Doak had laid the tile, after which Rhoads was to plant this land to corn and give Doak half of the corn raised on it. Rhoads was to keep the fences in repair, haul the ~~tiks~~ tile and fill the ditches without any compensation, but was to be paid one dollar per cord for cutting the wood and whatever it was worth for cutting and hauling out any timber that was suitable for logs off the land that he was to clear..

Plaintiff claims that Rhoads did not pay the rent on the pasture land, that he owed for one and one half tons of hay, that he did not repair the fences and failed to plant to corn the land cleared.

Rhoads cleared the timber land and hauled the tile, but Doak did not have it laid in time to plant corn on the land after it was laid.

Doak rented the sugar camp pasture to one Snedeker but claims that by reason of the fences not being in repair around it, Snedeker did not keep it and refused to pay theagreed rent. Doak seeks to recover under his distress warrant the cash rent for the pasture land, the damages he sustained by reason of Snedeker not keeping

the fifteen acres, and also [illegible] for [illegible] teen acres not being planted to corn.

The defendant Rhoads insists he was under no obligation to keep up the fences around the sugar camp pasture, but only to repair the fences on the land rented by him, and [illegible] area the timber land but could not plant it to corn because Doak did not lay the tile. Rhoads also claims that he repaired [illegible] fences, even on the land that he insists he was under no obligation to repair, and that Doak pastured the sugar camp pasture with horses of his that were breachy and broke out and damaged Rhoads' crops. Rhoads claims a set off for various matters including cutting wood, posts, logs, hauling logs and tile and clearing land etc. amounting to $456.38-

The case was tried by a jury. By agreement of the parties the court instructed the jury orally. The jury returned a verdict for plaintiff for $5. on which judgment was rendered and he appeals.

The plaintiff, while he has assigned error on the admission and rejection- of evidence, has neither in his statement, brief or argument pointed out anything which he claims or states to be erroneous; neither was any exception taken to the instructions given by the court, hence no question of law is presented to this court for review.

Appellant admits that appellee is entitled to items of set off amounting to $131.53 for cutting wood, logs, etc., but insists that appellee was not entitled to compensation for other work done in clearing the land amounting to $226.50. , in which is included an item of $87. for hauling tile for which he claims pay because appellant did not carry out his contract to lay it. The parties to this suit tried it in the circuit court on the same theory as to the measure of damages. This appears from the evidence presented by them and admitted without objection. Appellant cannot in this court insist upon a theory inconsistent with that taken by him in the trial court. Braidwood vs. Miller, 89 Ill., 606; Johnson vs. Johnson, 166 Ill., App. 422; 2 CYC. 670.

It is apparent that some of the items for which appellee issued

his distress warrant should not be recovered in this procedure. The remedy by distress warrant is statutory and a landlord has no right to issue a distress warrant unless predicated upon a claim for rent; he cannot recover for any other matter under a distress warrant. Cummings vs. Elsholtz, 134 Ill., App. 457.

The question that appellant has argued is that the verdict and judgment cannot be sustained on the evidence. The evidence is very conflicting and there is no manifest preponderance either way. In such a state of the evidence the weight to be given to it and the credibility of the witnesses is a matter peculiarly within the province of the jury. Chicago Union Tr. Co., vs. Levenrosen, 222 Ill 506; Poppers vs. Schoenfield, 110 Ill., App., 408. The trial court approved the verdict and we cannot say that the verdict and judgment is against the weight of or not supported by the evidence. The judgment is therefore affirmed.

A F F I R M E D.

1913 -

M. H. Thompson
J. -

185 I.A. 89

185 A 89

(69)

Gen. No. 6127. October Term, 1913 - [illegible]
Filed Dec. 27, 1913 -

J. F. Comstock,
Appellee -

vs. ; Appeal from [illegible].

J. M. Keith and A. F. Keith,
Appellants.

Thompson, J.

This is an appeal from a judgment for $240. in favor of J. F. Comstock, against J. M. Keith and A. F. Keith.

The Keiths, who reside in Macon county, Illinois, are real estate agents, engaged in the sale of lands in the province of Saskatchewan, Canada, belonging to the Minneapolis Land Company of Minneapolis. The plaintiff is a real estate agent residing at Petersburg, in Menard County, Illinois. The land company was granted a special railroad rate of $20. to their lands in Canada and a rate of $40. for railroad fare and hotel expenses to prospective purchasers. The land company had arranged for an excursion on August 6, 1912, from Havana, Mason County, Illinois, to their lands in Canada. The appellee testified that on August 5, J. M. Keith called him over the telephone and informed him that John and Harmest Maurer, who resided in Cass county, fifteen miles west of Petersburg, wanted to go to Canada, and that Keith requested him to go and see the Maurers and persuade them to go on the excursion starting on August 6, and to offer them the customers' rate for the round trip and expenses and if possible, form a company to go to Canada.

Appellee went to the Maurer's residence, saw John Maurer, gave him instructions as to starting for Canada, told Maurer that he would probably go, and also learned from Maurer that Wilson Daniels from the same neighborhood would go to Canada. That same evening appellee called J. M. Keith by telephone and reported the conversation he had with Maurer. The next morning the Maurers and Daniels went to Comstocks' office and then with him took the train for Havana, where they were joined by J. M. Keith and others and pro-

crossed to Canada. Appellee testified that he had several conversations with Keith on the route and was requested by him to keep in touch with the Maurers and Daniels and so that they should not come in contact with other real estate men. From Winnipeg this party, consisting of real estate agents and about one hundred prospective customers, had a special car. The party spent several days in Canada driving about the country, the appellee being with them most of the time, boosting the land for which the appellants were agents. The Maurers bought 480 acres of land at the price of $15,700. Proof was made showing that the usual compensation to sub-agents on the sale of Canadian land was from $1. to $2. per acre and that appellants received $1,200. commission from the land company for making this sale to the Maurer's. J.H.Keith denied that he over the telephone requested appellee to see the Maurers. The Maurers gave a note for $2,500., the advance payment on the land, and the evidence showed that no commission was paid any person until the advance payment was made in cash, and appellee testified that Keith requested him to procure a loan for the Maurers with which to pay their note and that he did procure such a loan for them. Keith denied that he requested appellee to negotiate a loan for the Maurers. The evidence concerning the loan was excluded and the jury instructed to entirely disregard it.

The appellants insist that the verdict and judgment are not sustained by the evidence, and that the admission of the evidence concerning the procurring the loan was prejudicial error such as could not be remedied by its exclusion.

If the appellee at the request of appellants did work in procuring a loan for the Maurers we see no reason why appellee should not have compensation for what he did, and there is no legal reason urged for excluding such evidence. The appellants were not prejudiced by the ruling of the court.

The evidence was very conflicting. It was [illegible] proving [illegible] the jury to determine, from all the evidence and circumstances and facts appearing in evidence to [illegible] they would give credit. There is no manifest [redacted] or clear preponderance of the evidence [illegible] way. The trial court saw and heard the evidence and by its judgment has approved the verdict. This court on a review of all the evidence cannot say that it does not sustain the judgment.

Finding no error in the record the judgment is affirmed.

A F F I R M E D.

1913 –

L. Alsing –

27 - 16384

NICHOLAS RUDELMAN, doing business as Rudelman & Company, Plaintiff in Error,
vs.
C. E. HAFFENBERG, Defendant in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

Plaintiff Rudelman brought an action in the Municipal Court to recover of defendant Haffenberg commissions as a real estate broker for procuring a purchaser for certain real estate. The evidence tends to show that the plaintiff was employed by the defendant to procure a purchaser for such real estate; that defendant did not profess to be acting as agent for another, but himself employed plaintiff. The evidence further tends to show that plaintiff procured persons to buy said real estate and that defendant entered into a contract in writing with such persons for the purchase by them of said real estate and received from them a deposit of $500 on the contract. The contract was afterwards cancelled at the request of one of the purchasers and defendant sold the property at the same price to Diamond, a lawyer, who immediately conveyed to one of the original purchasers a half interest in the property and afterwards conveyed to him the other half interest. The Court directed a verdict for the defendant and this writ of error is prosecuted to reverse the judgment entered on such directed verdict.

If the defendant did not profess to represent another, but made the contract for himself alone, he became liable to the plaintiff for commissions in case he found a purchaser at the price and on the terms stated by the defendant.

We think that the court erred in directing a verdict for the defendant and the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

47 - 18483

IN RE PETITION OF LOUIS E. ERB by ADA A. ERB, his wife and next friend, arrested at suit of WILLIAM A. FRIDMORE, on Appeal of LOUIS E. ERB,
Appellant,

vs.

WILLIAM A. FRIDMORE,
Appellee.

[illegible] OF [illegible] TY
[illegible] COUNTY

MR. [illegible] DELIVERED THE OPINION OF THE COURT.

Appellant who filed his petition in the County Court for release under the Insolvent Debtors Act. In the hearing the County Court dismissed the petition and ordered that the petitioner be surrendered to the custody of the Sheriff, and the petitioner appealed.

Petitioner was held in custody by the Sheriff under a ca. sa. issued on a judgment in tort for one thousand dollars recovered against him by appellee Fridmore.

There is in the record no bill of exceptions. The judgment implies a finding that malice was of the gist of the action in which the judgment was recovered, and in the absence of a bill of exceptions it will be presumed, in favor of the judgment of the County Court, that there was sufficient evidence to support the finding that malice was of the gist of the action and that therefore the judgment dismissing the petition and remanding the petitioner to the custody of the Sheriff is proper.

The judgment is affirmed.

AFFIRMED.

115 - 18564

CITY OF CHICAGO, Defendant in Error,	)	ERROR TO MUNICIPAL COURT
vs.	)	OF CHICAGO.
THOMAS OSBORN, Plaintiff in Error.	)	

MR. PRESIDING JUSTICE BAKER

DELIVERED THE OPINION OF THE COURT.

The complaint in this case alleges that plaintiff in error Osborn was on April 18, 1912, engaged in a certain game of chance for the purpose of gaming and gambling for money or other valuable thing, such game being operated at 27 W. Adams street, Chicago, in violation of Section 978 of the Municipal Code. Said Section is as follows:

"978. GAMBLING PROHIBITED. No person shall deal, play, or engage in faro, roulette, or gambling for money or other valuable thing, or in any other device or game of chance, hazard or skill, either as bookmaker, dealer, keeper, player or otherwise, for the purpose of gaming or gambling for money or other valuable thing, under a penalty not exceeding two hundred dollars for each offense."

It is true, as contended by the defendant in error, the City of Chicago, that bookmaking is gambling. Swigart v. The People, 154 Ill. 484. In bookmaking the betting is with the bookmaker. In this case there is no evidence that any one made a bet with plaintiff or that a bet or any kind was made at the place named in the complaint. In the cases cited and relied on to sustain the judgment there was actual gambling. In Hess v. The People, 85 Mich. 128, the defendant took money and issued "policy" slips or tickets. In Robbins v. The People, 95 Ill. 175, the defendant dealt faro. In Swigart v. The People supra, in a place under the control of the defendant, pools were sold and books made on horse races.

The evidence fails to show that the defendant was guilty of a violation of the ordinance, and the judgment is reversed.

DAVIDSON.

187 - 18644

FRANK WALLER,
Defendant in Error,

vs.

COOKE BREWING COMPANY,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

April 19, 1910, John V. Cooke was the cashier of the Cooke Brewing Company and on that day plaintiff Waller came to the office of the Brewing Company, was introduced to Cooke and said to him, according to Cooke's testimony, that "he had some money which he wished to leave with the Cooke Brewing Company for safe keeping." Plaintiff delivered to Cooke $700 which Cooke further testified "he put in the cash drawer with a cash memorandum to his credit." $375 of the amount so deposited plaintiff admitted was repaid to him and for the remainder, $325, he had judgment against the Brewing Company in the Municipal Court in an action tried by the Court.

The grounds of reversal urged by the Brewing Company, plaintiff in error, are, first, that the money was deposited with John V. Cooke and not with the Cooke Brewing Company, and therefore the Brewing Company is not liable; and second, that the money so deposited was repaid to the plaintiff. The following is the receipt given to plaintiff:

"Chicago, Ill., April 19, 1910.
Received of Frank Waller seven hundred dollars $700.00 for safe keeping.

John V. Cooke."

On the face of the receipt was stamped with a rubber stamp the words:

"Paid
Cooke Brg. Co.
Apr. 19, 191 .
per

Some of the payments were indorsed on the original receipt; for others separate receipts were taken. The receipts were substantially in the following form: "Received of the Cooke Brewing Co._____dollars on account." Two of such receipts were filled out by Henely, the bookkeeper and office manager of the Brewing Co., and the others by John V. Cooke. In November, 191 , after John V. Cooke had quit the service of the Brewing Company, plaintiff applied to the Brewing Company for money and Henely handed him the receipt and told him to take it to Charles Cooke. He did so and Charles Cooke paid him $10 and a few days later $15. We think that from the evidence the Court might properly find that the money in question was deposited with the Cooke Brewing Company.

The contention that the $700 was repaid to plaintiff is based on the contention that plaintiff was paid on April 28 $500. John V. Cooke so testified and the receipt of that date which plaintiff signed is for $500. Opposed to this evidence is the testimony of plaintiff that at the time the receipt was signed he did not have his spectacles and could not read without them; that he asked for $50 and received only $50, and that he signed the receipt on the faith of John V. Cooke's statement that it was a receipt for $50 and also the fact that if plaintiff was paid $500 on April 28 then he was paid in the aggregate $775 or $75 more than the amount plaintiff delivered to John V. Cooke.

We cannot say that on the evidence in this record the Court might not properly find that the plaintiff was paid but $50 on April 28, and that there was still due him $325, the amount of the judgment.

We think the record is free from error and the judgment is affirmed.

AFFIRMED.

198 - 18656

THOMAS J. CROWE,
Defendant in Error,

vs.

WALTER B. TEMPLETON,
Plaintiff in Error.

ERROR TO THE MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This was an action by the plaintiff, Mr. Crowe, for professional services in which he claimed $411.50 and recovered $139.50. It is conceded that defendant was entitled to a further credit of $200, and we think a charge of $100 for an operation should have been $50. Taking such deductions the remainder of the amount claimed is $161.50 - $22 less than the amount of the recovery. We can not, on the evidence in the record, say that the court might not properly find that the plaintiff was entitled to recover the amount of the judgment, and the judgment is affirmed.

AFFIRMED.

36 - 18467

October Term, 1936

MAX WEINBERG for use of
FRANK A. Flavin,
Defendant in error,

vs.

J. KRUEGER and ANNA E. KRUEGER,
Plaintiffs in error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

The judgment of the Municipal Court of Chicago, which this Court by this writ of error is called on to review, is for $50.42 and costs of suit. It is in favor of Max Weinberg as the nominal and Frank A. Flavin as the beneficial plaintiff and against "J. Kruger and Mrs. J. Kruger." Mrs. J. Kruger has (jointly with her husband, J. Kruger) sued out this writ of error by the name of Anna E. Krueger.

The proceeding was one in garnishment. Flavin had secured a judgment in the Municipal Court of Chicago against Weinberg for $42.21, and thereupon had begun garnishment proceedings against the defendants jointly.

The defendants answered orally that they owed Weinberg nothing. The plaintiff announced his intention of contesting the answers. According to the transcript before us, the only evidence of indebtedness to Weinberg by anybody was his own testimony. "I know Mr. J. A. Krueger. I did some work for him at 6328 Peoria street. The work I did for him was marble work in vestibule, mosaic floor and threshold. I was to get ninety-five dollars for the job and I have not been paid."

There is no evidence connecting Anna E. Krueger

or "Mrs. J. Krueger" with the matter in any way. The judgment is a unit and if erroneous as to one defendant must be reversed as to both.

The judgment is reversed and the cause remanded to the Municipal Court of Chicago.

REVERSED AND REMANDED.

74 - 18518

JAMES A. HUGH,
Defendant in Error,

vs.

C. A. WILLIAMS,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

James A. Hugh, the defendant in error in this case, secured on March 6, 1912, in the Municipal Court of Chicago, a judgment for $300 against C. A. Williams, the plaintiff in error here and defendant below.

The cause was tried below by the Court without a jury. The claim of the plaintiff Hugh was stated to be for a balance due on a verbal contract "entered into on or about May 5, 1911, for the sale of an engine by plaintiff to the defendant for the sum of $1250", on which $950 had been credited by the plaintiff, leaving $300 due.

The defendant asserted in his affidavit of defence that he never entered into any such contract and owed the plaintiff nothing, and now insists that the decision of the Court below to the contrary is unwarranted by and contrary to the preponderance of the evidence adduced at the trial. We do not agree with this.

It is not denied that Hugh sold and delivered the engine to some one nor that there is $300 due him on account of it, nor that Williams received the engine and used it for his own purposes. But Williams says that a corporation, now insolvent, called the National Boat and Engine Company, bought the engine from Hugh and that he, Williams, has paid that Company (of which he was secretary) for it, and now owes nobody

on its account.

The material facts shown in the trial were these: About May 1, 1911, Mr. Williams called up Mr. Hugh on the telephone and telling him that he was "Mr. Williams of the National Boat & Engine Company", further said that a Mr. Simmons had told him that Hugh had an Emerson engine for sale and asked the price. Mr. Hugh told him $1250. At a subsequent conversation over the telephone, also initiated by Mr. Williams, he told Mr. Hugh that he would take the engine, pay him $300 and apply $950 to a debt which Mr. Hugh had contracted to Mr. Simmons, who was building him a boat. At the same, or at a subsequent telephone conversation shortly after, Mr. Williams, who again called up Mr. Hugh, told Hugh that he wanted the engine shipped to a Mr. Babcock at Spring Lake, Michigan, where he, Williams, was having a boat built.

May 8, 1911, Mr. Williams sent the following letter to Mr. Hugh:

"Dear Sir:

In accordance with telephone conversation of this evening you will please ship by freight at once to Mr. A. E. Babcock, Spring Lake, Michigan, one 6 Cyl. 100 H. P. Emerson engine with reversing clutch, Lea Magneto, Attwater-Kent System fly-wheel and propeller and a twelve foot length of shafting, billing us $1,250 to apply on your account.

We understand that the magneto, propeller and shaft will come along in a few days, but that you will see that delivery is made prior to the 20th at the very latest.

In view of the fact that the boat in which the engine is to be installed is complete and waiting for the engine at present, will you kindly make shipment tomorrow, Tuesday, if possible, advising the writer personally when you have done so.

Yours very truly,
National Boat and Engine Company,

Secretary."

In reply to this, Mr. Hugh wrote the following letter to Mr. Williams:

"Chicago, May 11, 1911.

Mr. C. A. Williams,
National Boat & Engine Co.,
Chicago, Ill.

Dear Sir:-

I did not ship the engine today as I thought before doing this we had better have a clear understanding between

yourself and myself. I notice in your letter that you instruct me to bill this to the National Boat & Engine Co. to apply on my account. I have no account with the National Boat and Engine Co. My contract is with Mr. Ned Simmons of the Inland Lakes Boat Co. and was made long prior to the organization of the National Boat and Engine Co. My contract was for $1200, $250 paid in cash with order and $950 to be paid upon delivery of the boat to me completed.

I think the best thing for you to do would be either give me a check for $1250, or you can arrange with Mr. Simmons to give him a check for $950 and send me a check for $300. Whichever way you prefer would be satisfactory to me; however, if you arrange with Mr. Simmons, kindly send me a receipt from Simmons for $950. If you care to hold the $300 until I furnish the propeller, shaft and magnetoe, it will be perfectly satisfactory to me.

Kindly advise me at once, as I have the engine packed ready to deliver to the railroad as soon as I hear from you.

Very truly yours,
James A. Pugh."

To this Williams immediately replied as follows:

"May 13, 1911.

Mr. Jas. A. Pugh,
Dear Sir:-

I note all you say in your letter of the 11th and while it is quite true that your contract is with the Inland Lakes Boat Co., yet that company has been absorbed as you know by this concern, and when your payment is made to Mr. Simmons it will simply be endorsed over to us. In fact my receipt for due bill for $950 would be accepted by Mr. Simmons as covering your account.

Entirely aside from this consideration, if you will ship the engine at once and see that the various accessories are sent forward, also render the bill to this company, I will personally see that the account is taken care of either by receipting your account with the Inland Lakes Boat Co. plus a check for $300, or by a check for the full amount, independent of the other bill.

As you know, the question of applying this sum on your account was your suggestion. At any rate, I think you will probably agree that either the National Boat & Engine Co. or the writer personally is good for the credit involved, and since I have a man holding up other work to install this engine, I trust you will get it off promptly and that you will rush the missing parts in all possible haste. I presume that the engine is properly geared and fitted so that the installation of the magneto will be a simple matter. I want to guard against getting the engine and separate magneto over to a place like Spring Lake unless it is a simple question of putting them together without machine shop work.

Yours truly,
National Boat & Engine Company,

Secretary."

In the transcript of the record, as in the abstract, there is a blank above the word "Secretary" in this and in the letter heretofore recited of May 8th. The defendant in error's brief says the letters were actually signed "National Boat &

Engine Company per C. A. Williams, Secretary". It is immaterial. They were written by Williams. Upon receipt of this letter the engine was shipped by "Hugh Terminal Warehouse Co. per Jas. A. Hugh" to A. W. Babcock, Springlake, Michigan, by the Grand Trunk Western Ry., whose receipt on the bill of lading in evidence is dated May 16, 1911.

We think that these three letters and this shipment are the determining matters in this case, and agree with the plaintiff that they make Mr. Williams liable to Mr. Hugh for the amount for which judgment was rendered. Mr. Simmons has given credit for the $950 to Mr. Hugh. At least so one is claiming that against him. But the $300 he has never received. The fact that the letters of May 6th and May 13th were signed by Mr. Williams with the corporate name of the organization of which he was secretary, does not in reality detract from the personal obligation he recognized not only in the matter of the letter of May 13th, but even in its form, which it may be noted is characterized by the use of the first person singular throughout.

We do not think that the subsequent correspondence, which included the socalled "order" under date of May 23rd, signed Inland Lakes Boat Company, nor the fact that from that time until about November Mr. Hugh did not demand the balance of $300 due him created any "estoppel", as defendant claims, or altered the rights of the parties, which we think were properly adjudicated by the Judge who tried the cause in the Municipal Court. The judgment is therefore affirmed.

AFFIRMED.

175 - 18631

PENNSYLVANIA COMPANY, Plaintiff in Error, vs. THE DUNHAM TOWING AND WRECKING COMPANY sued as GREAT LAKES TOWING COMPANY, Defendant in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

The judgment attacked by this writ of error was rendered by the Municipal Court of Chicago on the verdict of a jury May 25, 1912. It was of nil capiat and for costs against the Pennsylvania Company, plaintiff in that court and plaintiff in error here, which had sued the defendant, the Dunham Towing and Wrecking Company, for damage done to the pier protection of the Pennsylvania Company across the Calumet river i in this County on November 6, 1909. This damage was, in the statement of claim which was made the basis of the suit, charged to "the negligence of the defendant, its agents and servants in the operation, management and navigating of two of its tugs, to-wit, G. D. Rau and Field, which were towing a certain boat, to-wit, Wm. Nottingham, by reason of which negligence said boat ran into, bumped against and struck with great force said protection pier, consisting of a clump of piles driven into the bed of said Calumet river near the bank thereof at said bridge, breaking off said clump of piles and rendering them entirely valueless, and necessitating the replacing of said clump of piles; to the damage of plaintiff in the sum of three hundred dollars."

The defendant in its affidavit of merits declared that neither said defendant nor its agent or servant was negligent in the operation, management or navigation of its

said tugs or either of them, at the said time or place; that the negligence, if any, was in the handling of the said steamer Wm. Nottingham, by its owner, master and crew, and that said clump of piles was not damaged at the time and place aforesaid as set forth in plaintiff's statement of claim.

The testimony of the witnesses at the trial was contradictory and irreconcilable.

The trial Judge charged the jury orally as follows:

"The burden of proof is upon the plaintiff to show by a preponderance or greater weight of evidence that the accident which occurred was caused by the negligence of the defendant, and that the accident, or the damages that were sustained, if any were sustained, were attributable approximately (sic) to the negligence of the defendant. Unless the plaintiff has proven that by a preponderance of the evidence they have no right to recover and you should find for the defendant and find the defendant not guilty. In the event that the proof shows that the accident occurred through the negligence alone of the defendant, then you will consider in your verdict the amount of damages which have been proven, if any have been proven. You are to try the case fairly between the parties without sympathy and without prejudice. You have a right to consider the interest, if any be shown, that any witness has in the outcome of the trial, together with all the facts and circumstances in evidence, and should return your verdict in accordance with the truth.

If you believe from the evidence any witness has knowingly and wilfully testified falsely as to any fact material to the issues in the case, you have a right to entirely disregard such witness' testimony except in so far as it has been corroborated by other credible evidence or facts and circumstances in evidence."

After this charge was given the Judge asked: "Does either counsel desire to have me instruct further?" To this no response was made by either party, and the court then proceeded to give the alternative forms of verdict to the jury. No objection or exception of any kind was then or afterwards in the Municipal Court taken to these instructions, so far as the record shows; but in this court there are assigned as error those portions of the charge which say that "In the event the proof shows that the accident occurred through the negligence alone of the defendant, then you will consider in your verdict the amount of damages which have been proven, if any have been proven", and "You have a right to

consider the interest, if any be shown, that any witness has in the outcome of the trial, together with all the facts and circumstances in evidence, and should return your verdict in accordance with the truth."

We do not think that the plaintiff in error, under the circumstances, is at liberty to complain of the whole or any part of this charge. The objection should have been made below. But we do not think that taken together and in connection with the evidence, which we have carefully read and considered, the instructions misled the jury. We think the use of the word "alone" in the first excerpt was understood by the jury, as it is indicated by counsel for plaintiff in error it was understood by them, as referring to the question of suggested contributory negligence, and not to that of the possible concurrent negligence of the steamer and the tugs. Nor do we think the use of the word truth in the second excerpt misled the jury into the belief that they were at liberty to found their verdict on anything but the evidence and legitimate inferences from it.

The emphasis of the plaintiff's argument, however, is placed on the contention that the verdict was against the manifest preponderance of the evidence. We cannot assent to this proposition. The testimony was conflicting. It was even variant on each side among the witnesses for that side. It would be useless here to discuss it. We have thoroughly and carefully considered it and can come to no other conclusion than that the credibility of the witnesses and the weight of their testimony on the questions involved in this case were proper matters for the jury to decide, and that the decision they arrived at was not so manifestly unreasonable or erroneous as to justify us in interference.

The single ruling on evidence which is complained of

seems to us correct. The proposed testimony was of very doubtful competency, and even had it been competent, was, in our opinion, immaterial.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

31 - 18420

CHATTANOOGA SAVINGS BANK, Defendant in Error, vs. CHARLES L. LUMBY, Plaintiff in Error.	Error to Municipal Court of Chicago.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff in error, Charles L. Lumby, sold his interest in a horse-shoeing business in Chattanooga, Tenn., to L. L. Miller, who gave Lumby therefor a note signed by himself and Ida B. Miller, dated May 11, 1910, for $303, due ninety days after date, payable to the order of the Chattanooga Savings Bank, the defendant in error. Lumby held the note for about two months, and then wrote his name on the back of it and sold it to the bank, with which he kept an account. When the note fell due the president of the bank obtained from Miller a payment of $53 and a new note for $250, due in ninety days.

The president of the bank testifies that the old note was pinned to the new note as collateral to the latter, and that his purpose in taking the new note was that he might proceed with the collection of the new note at any time in case he could not find Lumby, who had at this time left Chattanooga.

There is some testimony that on the day before the note fell due an attorney for Lumby told the cashier or assistant cashier that he represented Lumby and insisted that Miller pay the note, and if it was not paid he wanted to be called up and notified, and he would see that payment was enforced against Miller, and that on the next afternoon, on inquiring at the bank, he was told that Miller had "taken care of it." That such conversation took place is denied by the testimony of other witnesses.

Miller went through bankruptcy and the second note was filed as a claim against the bankrupt, upon which a dividend of $52.52 was paid. This suit was brought against Lumby for the balance due, and judgment was rendered against him.

Counsel for the bank argues with force that as the case was tried by the court without a jury, and no propositions of law were submitted and no motion for a new trial made, and no exception preserved to the finding or judgment of the court or to any ruling, there is therefore no question preserved on the record for review.

While giving due consideration to this point, but without expressing an opinion thereon, we believe it is more satisfactory that our decision should be based upon the merits of the controversy.

The claim as set up in the affidavit of defense, that the new note was given in full payment and in cancellation of the first note, is wholly unfounded, as shown by the uncontradicted testimony of the president of the bank, who was the only witness testifying as to the transaction. The same testimony also disproves any claim that it was the intention of the parties to make an extension of the first note. Where an old note is retained as collateral for a new one, there is no extension. Penny v. Crane Bros. Mfg. Co., 80 Ill. 244.

In our judgment Lumby must be considered as a guarantor of the note. It was payable on its face to the bank, and no endorsement by Lumby was necessary to pass title to the bank. By endorsing the note the transaction came within the rule that where a person not the payee of a note places his name on the back thereof, the legal presumption is that his liability is that of a guarantor. De Clerque v. Campbell, 231 Ill. 443; Kingsland v. Koeppe, 137 Ill. 344; Cushman v. Dement, 3 Scammon 497; Boynton v. Pierce, 79 Ill. 145; Stowell v. Raymond, 83 Ill. 120; Eberhart v. Page, 89 Ill. 550. There is nothing before us to rebut that presumption.

This view of the matter makes inapplicable those decisions of the Tennessee courts and the provisions of the statutes of that state with reference to a person secondarily liable. A guarantor is an original promisor, and not one secondarily liable. Stowell v. Raymond, supra; Gridley v. Capon, 72 Ill. 11; Parkhurst v. Vail, 73 Ill. 343; Carroll v. Weld, 13 Ill. 683. The only way the guarantor might have been relieved from liability was by the payment of the original note, and this, as we have seen from the evidence, did not take place.

The judgment of the trial court was right, and it will be affirmed.

AFFIRMED.

412 - 18458

CARL STRUM, Appellee, vs. J. M. BERRY and L. C. BERRY, Appellants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree obtained by Carl Strum restraining J. M. and L. C. Berry, hereinafter called defendants, from interfering with his possession of premises occupied by him under a lease from the defendants, and also from instituting any suit against Strum for rent or for possession, and from shutting off the motive power to said premises, and directing the defendants to supply Strum with motive power. Strum, hereinafter called complainant, under a written lease from the defendants, occupied the second floor of a two-story building, at the rear of which and immediately adjoining it was another building owned by the defendants which was one-story high. This rear building stood about 13 feet back from the side line of the front building, and this space of 13 feet was occupied by a platform covered overhead with a canopy which was an extension of the roof of the one-story building, extending its full length, which was about 60 feet. This canopy touched the rear wall of the two-story building at a point about three to four feet below the level of the second story floor. This side of both buildings opened onto a loading or wagon yard.

There was a trapdoor in the front building leading from the first floor to the second, and a wide door at the rear of the second story, opening out somewhat above the canopy above described.

In March, 1909, the complainant, a manufacturer of brooms, began negotiations for the lease of the second floor, and it was then agreed that the defendants should fasten a chain tackle to the ceiling of the second floor above the trapdoor, and install a windlass on the second floor, so that complainant could draw his broom corn up to that floor. The defendants also agreed to build a platform on that part of the canopy immediately beneath the rear door of the second story, and place on that platform a chute, so that complainant could slide his brooms down into wagons in the yard.

These changes were made, and complainant took possession in April or May, 1909, although the lease apparently was not signed until June; it is dated July 1, 1909, for a term commencing July 1, 1909, and expiring April 30, 1912.

The premises demised are described as the "second floor of building 456 No. Branch St.," with a provision that stairs, hallways and elevators should be used in common with all tenants.

After complainant took possession the bales of broom corn were unloaded on the ground platform in the rear, placed on a truck and hauled onto the first floor under the trapdoor, then attached to the chain tackle and hauled up by means of the windlass, worked by an employe. The finished brooms were taken through the rear door of the second floor onto the platform built over the canopy, and from there pushed down the chute.

About August 1, 1909, the first floor of the front building was rented by the defendants to other parties, who nailed shut the trapdoor between the first and second floors, and thereupon at the request of the complainant the following changes were made: A door was put on the side, near the rear of the front building, so that a rear stairway could be utilized, thus giving direct access from the second story to the yard. An opening was then cut through the canopy just beneath the rear door of the second story, and through the platform on which the chute rested, and double trapdoors placed in the opening. A tackle was then attached to a beam which extended out from the rear wall of the two-story building, over the rear door of the second floor. This tackle and beam were directly above the trapdoors through the canopy and platform.

After this broom corn coming into the building was hoisted directly from the rear ground platform through the trapdoors in the canopy and second story platform, and taken in at the wide door in the rear of the second story. The lifting, however, was not done by hand, as formerly, but by a horse hitched to the tackle, which was operated by means of pulleys and ropes. The evidence tends to show that the complainant considered this arrangement superior to the previous plan for getting his supplies onto the second floor.

In April, 1910, the defendants leased the rear one-story building to a concern called the American Wood Preserving Company, and by the terms of the lease the lessee was given the right to remove the platform and canopy for the purpose of giving light to the premises. On April 17th, 1910, this lessee removed the second-story platform and all that portion of the canopy which was below the door at the rear of the second story. It is said that its purpose in

doing this was to permit light in that end of the one-story building, which the new tenant intended to use as an office. The chute was left suspended by a cable, and in July the agent for the defendants fastened it to the rear wall of the building and added a piece to it so as to make it reach and come in front of the door on the second story, the new piece being attached to the old by hinges and suspended by means of cables attached to a pulley and so arranged that the new piece, which extended in front of the door when in use, could be raised up out of the way entirely when not used.

In the testimony complainant claims that this chute is no longer usable, but it is a fair inference from what is said by the witnesses that the complainant never tried to use the chute as it was arranged in the last instance.

On November 5, 1910, the bill of complaint herein was filed, claiming that the foregoing occurrences amounted to an eviction, and praying that the defendants be restrained from interfering with the complainant or with the premises, etc. Answer was filed by the defendants denying that there was any eviction. Afterwards the defendants filed a cross-bill, claiming a certain sum due for rent, water taxes and costs, alleging that complainant was still in possession, and praying for an accounting and a decree against the complainant for the amount due. A demurrer to this was filed and sustained. The issues made upon the original bill were referred to a master in chancery, who took testimony and made a report finding that there was a partial eviction, and that the trapdoor, canopy, chute,etc., constituted appurtenances to the premises under the lease, and recommending that the relief prayed for by the complainant be granted. Objections were filed before the master and

exceptions before the court, which were overruled, and a decree entered in conformity to the findings of the master.

It is very doubtful whether the foregoing occurrences can be considered as an eviction of the complainant by the landlord. Complainant was dispossessed of no part of the second floor of the building, the premises described in his lease, and he did not vacate the same but continued therein, as is claimed, for the full term of his lease. To permit this decree to stand would have the effect of protecting complainant in his possession of the leased premises, with directions to the defendants to furnish motive power, without requiring complainant to pay anything for the same. While it is undoubtedly the law that an eviction by the landlord of his tenant of a material part of the premises under lease will justify the tenant in refusing to pay rent, yet we do not think the facts before us bring this case within that rule. We are unable to say that the material situation after the changes made in July, 1910, was greatly different from what it was prior to April 17th. No change is pointed out in the chute which would seem to be to the disadvantage of the complainant. Indeed, it would seem rather to facilitate the lowering of the brooms to the wagons to be able to place them directly from the second floor into the chute, as could be done after July, 1910, than to take them from the second-story floor onto the platform above the canopy, and from this place them into the chute. Only one motion would be required by the former process, while two or three handlings would be necessary by the second method described.

It is a more serious question as to the effect of the removal of the platform above the canopy, with reference to the operation of hoisting broom corn into the sec-

ond story, but we are unable to see any important difference in hoisting it through a trapdoor in the canopy and platform, and the same process with the canopy and platform removed. In any event the most that could be claimed by the complainant is that the arrangement was not quite so convenient as theretofore; and this brings the case squarely within the rule announced in Rubens v. Hill, 213 Ill. 523, which is as follows:

> "The court properly instructed the jury that, if they should believe from the evidence that any wrongful act of the appellee or omission to perform anything, required of her by her lease, was such as tended merely to diminish the beneficial enjoyment of the premises leased by the appellant, he was still bound for the rent if he continued to occupy the same, and that, if the appellant did not abandon the leased premises, his obligation to pay the rent therefor remained, but that he might show, as a matter of defense in what manner such beneficial enjoyment of the premises was diminished by such act or omission to act of the plaintiff, and recoup from the rent such damages, if any, he may have shown by the evidence he had sustained by reason of the wrongful act or omission to act of the plaintiff. Such is the law as has been declared by this court", citing Chicago Legal News Co. v. Browne, 103 Ill. 317; Barrett v. Doddie, 158 Ill. 479, and Keating v. Springer, 146 Ill. 481.

Other cases might be cited, all tending to support the rule that where the landlord has done anything tending merely to diminish the beneficial enjoyment of the premises, the tenant is still bound for the rent if he continues to occupy the same, although he might show, as a matter of defense in a suit for rent, how much such beneficial enjoyment was diminished by the act of the landlord, and recoup for whatever damages he may be able to show he had sustained through the wrongful act of his landlord.

In May, 1910, defendants brought suit in the Municipal Court against the complainant for possession and rent, in which a verdict and judgment were entered in

favor of the complainant. It appears that in this suit Strum pleaded partial eviction, and it is claimed that this is res judicata as to the question of eviction. Two adequate answers may be made to this claim: First, that it does not appear from the record before us of the Municipal Court case but that the judgment was based upon some other ground than the claim of eviction; and second, that the condition of the apparatus in question was not the same at the time of the filing of this bill as it was upon the date of the judgment in the Municipal Court. The outcome of other suits in the Municipal Court which did not proceed to judgment cannot avail as matters of estoppel.

We are of the opinion that justice requires that the decree be reversed and the cause remanded, with directions to dismiss the bill for want of equity.

REVERSED AND REMANDED.

411 - 18457

CARL STRUM, Appellee, vs. J. M. BERRY and L. C. BERRY, Appellants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE MC SURELY DELIVERED THE OPINION OF THE COURT.

In connection with the controversy narrated in the opinion of this court this day filed in case general number 18458, the following proceedings were had:

The defendants to the bill filed by complainant, Strum, filed a cross-bill alleging that the complainant, Strum, had filed a suit for $10,000 against the defendants on an alleged cause of action growing out of the same matters alleged in the chancery suit, and said cross-complainants prayed that Strum be enjoined from prosecuting this suit. An injunction was issued pursuant to the prayer of this cross-bill. Thereafter Strum filed a demurrer to the cross-bill as amended, which demurrer was sustained and the injunction issued upon the cross-bill dissolved.

Strum, the complainant in the original bill, filed suggestion of damages in relation to the dissolution of the injunction issued upon the cross-bill, and this question of damages, together with the issues made upon the original bill, was referred to the master in chancery, who allowed the complainant $250 damages for solicitor's fees. From this finding the complainants in the cross-bill, J. M. and L. C. Berry, have appealed to this court, which appeal, for the purposes of hearing, was consolidated with No. 18458.

The objections made to the allowance go to the reasonableness of the amount, and it is sought by argument to

show that the services actually rendered were not reasonably worth as much as was allowed. While admitting considerable force in the claims of appellant on this point, yet in view of the testimony of many witnesses as to the value of the services rendered, we are not prepared to say that the conclusions of the master were not justified. Indeed, we do not find that any attempt was made by counter testimony to controvert the effect of the evidence on this point.

The decree, approving the finding of the master in this respect, is affirmed.

AFFIRMED.

119 -18566

TAUFICK N. KOTITE and [illegible] W. PARHOOD, Copartners, doing business as Kotite & Parhood,
Defendants in Error,

vs.

ABU-SAMRA S. GAZELLE,
Plaintiff in Error.

WRIT OF ERROR TO [illegible] MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McSURLY DELIVERED THE OPINION OF THE COURT.

Defendants in error, hereinafter called plaintiffs, commenced a suit in attachment against plaintiff in error, hereinafter called defendant. The attachment writ was served upon the defendant in person, and he entered his general appearance in the cause. The case was tried by the court, who found the issues as to the attachment against the plaintiffs, and the issues as to the merits of the case against the defendant.

Defendant's counsel urges as grounds for reversal certain informalities in the attachment writ. Such informalities, if any, are not material now, as the attachment issues were found for the defendant.

Hurd's Revised Statutes 1911, chapter 11, section 27, speaking of attachment issues, say: "but if found for the defendant, the attachment shall be quashed, and the costs of attachment shall be adjudged against the plaintiff, but the suit shall proceed to final judgment as though commenced by summons." This provision of the statute was followed in the case at bar. See Wasson v. Cone, 86 Ill. 46, and McMurray v. Thede, 86 Ill. App. 557.

If defendant had wished to appear only for the purpose of moving to quash the writ, his appearance should have been limited to that purpose. This he did not do, but

filed a general appearance, which was sufficient to give the court jurisdiction, although the attachment writ may have been informal.

The judgment will be affirmed.

AFFIRMED.

166 - 18622

MARGARET L. FELKEY, Defendant in Error,	)	
vs.	)	Error to Municipal Court of Chicago.
MARY ROBERTS and F. F. ROBERTS, Plaintiffs in Error.	)	

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This was a suit brought by Margaret Felkey against Mary Roberts and F. F. Roberts for wages claimed to be due her as a stenographer. The case was tried by the court, and judgment for $140 was entered against both defendants.

We have searched the record through in an endeavor to find any evidence as to the employment of plaintiff by Mary Roberts. There is evidence tending to show employment by and work done for the defendant F. F. Roberts. It is sought to hold Mary Roberts apparently upon the theory that some of the work was done "on behalf of Mary Roberts"; that is, she is thought to be liable because she might be beneficially interested in some of the stenographic work done by the plaintiff at the request of F. F. Roberts. We cannot conclude that this would make Mary Roberts liable, and the judgment against her was erroneous; and if erroneous to one it is erroneous as to all. Samonski v. Chicago City Ry. Co., 156 Ill. App. 297; Claflin v. Dunne, 129 Ill. 241.

For the reason above indicated the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED

182 - 18639

FIRST NATIONAL BANK OF CHAMPAIGN, ILLINOIS, Defendant in Error, vs. JOHN A. BRYANT PIANO COMPANY, Plaintiff in Error,	Error to Municipal Court of Chicago.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

The First National Bank of Champaign, Illinois, hereinafter called plaintiff, recovered judgment on a promissory note made by the John A. Bryant Piano Company, hereinafter called defendant.

It is claimed that the trial court erred in striking the affidavit of defense from the files and entering judgment against the defendant as in case of default.

The note sued on was made payable to the Johnson Player Piano Co., and was endorsed by it and transferred to the plaintiff. The affidavit of defense sought to set up damages which defendant claimed to have suffered in a transaction between it and a concern, other than the payee, which had endorsed the note, which transaction had occurred after the execution of the note in question.

This is clearly a case of unliquidated damages, not only arising out of a different transaction, but apparently a transaction between other parties. It is not a proper subject-matter of set-off, and the court committed no error in striking the affidavit of defense from the files; and under section 55 of the Practice Act plaintiff was entitled to judgment as in case of default.

Plaintiff has asked for statutory damages on the ground that this writ of error has been prosecuted for delay, and this

motion will be granted and the plaintiff awarded $15 as damages, and the judgment is affirmed.

AFFIRMED.

193 - 18649

FRANCESCA KARCZEWSKA, Defendant in Error, vs. JOSEPH CHMIELEWSKI, Plaintiff in Error.	Error to Municipal Court of Chicago.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is a breach of promise suit in which defendant in error, hereinafter called plaintiff, recovered a judgment for $150.

It is argued that the finding of the court is against the weight of the evidence. If plaintiff's story is to be believed, the defendant entered into an agreement to marry her. A number of witnesses testified to circumstances which tend to support her story. The only denial comes from the defendant, and his denial goes only to the precise words he used in addressing plaintiff. It is undisputed that the occasion of his interview with plaintiff and her friends was to enter into a contract of marriage if agreeable to both parties. The plaintiff was certainly willing, and so informed the defendant, and his conduct and statements at the time would reasonably lead both the plaintiff and her friends to believe that he also was willing.

Consideration of the entire record fails to move us to the conclusion that the finding was not justified, and the judgment is affirmed.

AFFIRMED.

October Term, 1912. To.

448 - 18919

GEORGE FUGINA,
Appellee,

vs.

FEDERAL FURNACE COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

Appellee, George Fugina, recovered a judgment against appellant, Federal Furnace Company, in the Circuit Court of Cook County, for personal injuries. This appeal brings the judgment here for review.

The record shows that appellee, prior to the day of his injury, had been in the employ of appellant as a laborer for five days, handling scrap iron, etc., and working under a foreman named Ferri. Appellee is a Slavonian and at the time in question understood the English language very imperfectly. On the evening before his injury, he was ordered by Ferri, the foreman, to go the next morning and shovel off flue dust from the car in question under the order of one Collere who was an Italian. There were three other Italians working with appellee on the day of his injury, but he did not talk with them because it was difficult for him to understand. All of these men testified at the trial through interpreters. On the morning of the day of his injury, Collere gave plaintiff a shovel and told him to get upon the car and shovel off flue dust. Plaintiff did not understand what Collere said, but Collere showed him by motions with his hands. The men up to the time of the injury of plaintiff had been throwing flue dust over the sides of the car by means of shovels. The

car was a dump car with sloping sides and ends and openings at the bottom so that coal, dirt, or dust could be let out of the car through the openings. The flue dust which the men were shoveling out of the car in the forenoon was hot; the steel car was hot, and the braces and sides of the car were too hot for one to touch. While shoveling the flue dust from the car, the men stood on planks in order to keep the hot flue dust from burning their feet. They continued unloading the car by means of shoveling out the dust during the forenoon. In the afternoon, Collers ordered two of the men to get down out of the car and two of them, including the plaintiff, to remain in the car, and directed one of those whom he had ordered out of the car to release the appliances for opening the bottom of the car and to dump the flue dust. Plaintiff knew nothing about such a car, had never seen one before and knew nothing about its operation. He was totally inexperienced in the work of dumping a car of that kind, and did not understand what the man who opened the bottom of the car was doing, or what the foreman told him to do. When the dump at the bottom of the car was opened, plaintiff slid down through the opening into the hot flue dust and was badly burned, and apparently crippled for life.

The declaration filed in the case consists of six counts and numerous items of negligence are averred. A short statement of the substantive negligence charged in the various counts may be made as follows: That the defendant, through its foreman, issued negligent orders which caused plaintiff's injuries, and that the defendant negligently failed to warn and instruct the plaintiff as to the dangers of his situation.

No technical errors are urged. The only errors

assigned are that a verdict should have been directed for the defendant, and that the verdict is contrary to the evidence and the law. It is maintained in support of the errors assigned, (1st) that the evidence fails to show any negligence on the part of appellant; (2nd) that the plaintiff's injuries were proximately caused by risks which he assumed; and (3rd) that, if any negligence contributed to his injuries, it was that of fellow servants.

Upon a careful review of the evidence, we are of the opinion that it shows a negligent order given by the foreman. To require a workman to stand upon hot flue dust in a dump car while the dust was being dumped through the bottom of the car was to require the plaintiff, who was an ignorant man, to be and remain in a place of unusual danger. Plaintiff had never worked in connection with a dump car and had only been familiar with the car for a half a day, shoveling flue dust out of the car over its sides. This was not the regular work in which he had been engaged during the five days that he had worked for appellant. The work of shoveling was not dangerous, but when the method of unloading the car was changed by the order of the foreman so that the hot material would pass through the bottom of the car with a rush, the position of plaintiff in the car where he was ordered to stand became dangerous to an unusual degree. There was no way apparently by which an inexperienced man could save himself from going down into the hot dust owing to the peculiar structure of the car.

The evidence does not show that appellee's injuries were proximately caused by risks which he assumed. We think the court did not err in refusing to instruct the jury to find for the defendant. Pullman Palace Car Co. v. Leack,

143 Ill. 242; C. R. I. & P. Ry. Co. v. Rathbeau, 225 id. 278.

The foreman represented appellant when he ordered appellee to remain in the car while it was being dumped by means of the appliances in the bottom of the car, and the foreman and appellant were charged with the duty of seeing that the place where they put plaintiff was reasonably safe. The foreman was bound to take reasonable precautions for the safety of the plaintiff. Tone v. Chanley, 185 Ill. 390. The case was properly left to the jury to determine whether appellant's foreman exercised such reasonable and ordinary care to see that the place where he ordered appellee to work was reasonably safe, and also whether appellee knew or should have known the dangers to which he was exposed. We cannot say that the verdict was manifestly against the weight of the evidence.

The fellow servants of the plaintiff were obeying orders of the foreman in dumping the car. We find no evidence of negligence of a fellow servant in the case. At all events, it was a question for the jury, and was properly submitted to the jury.

The judgment is affirmed.

AFFIRMED.

461 - 1933

B. F. McKeage, Jr., and CHARLES F. DaCOSTA, Appellees,	APPEAL FROM MUNICIPAL
vs.	COURT OF CHICAGO.
SCULLY-KOSTNER COAL COMPANY, Appellant.	

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

Appellee, B. F. McKeage, Jr., and Charles F. DaCosta, recovered a judgment in the Municipal Court of Chicago against the Scully-Kostner Coal Company, appellant, for $1283.37, upon a contract set out in plaintiffs' statement of claim as follows:

> "This agreement made and entered into by and between the Scully-Kostner Coal Company, party of the first part, and Charles F. DaCosta and B. F. McKeage, Jr., parties of the second part,
>
> Witnesseth: That for and in consideration of the payment of $250 cash, and three notes payable in thirty, sixty and ninety days respectively, for the balance of $873 the same being for $291 each, the said party of the first part agrees to assign the judgment heretofore secured against the Prairie Box Board company, in the county Court of Grundy County, Illinois, by said party of the first part, to said B. F. McKeage, Jr.
>
> It is further mutually agreed between the parties hereto, that in the event that bankruptcy proceedings are started against said Prairie Box Board Company within sixty days from the signing and sealing of these presents, then said party of the first part agrees to repay to said parties of the second part, all payments made and all notes remaining unpaid under this agreement, upon reassignment of said judgment to said Scully-Kostner Coal Company.
>
> Scully-Kostner Coal Company, (Seal.)
> (Signed) By Joseph C. Kostner,
> President.
>
> B. F. McKeage, Jr.
>
> Dated, Chicago, Ill., January 28, 1910."

The statement of claim then avers that the Prairie Box Board Company was adjudged a bankrupt within sixty days

from the making of the above contract, and that before the commencement of the suit, said B. F. McKeage, Jr., released unto the said Scully-Kostner Coal Company all right, title and interest in the judgment mentioned in the contract; and it is further alleged that the plaintiffs demanded of the defendant the return to them of $250 mentioned in the contract and that it deliver all payments made on the contract and all notes remaining unpaid in accordance with the terms of the agreement, and that the defendant failed and refused to pay the plaintiffs the $250, and neglected to deliver to them all payments made on the notes and all the notes remaining unpaid under said agreement.

Upon the close of the evidence, the court instructed the jury to find for the plaintiffs for $1863.37.

It is urged on behalf of appellant that there was no consideration for the defendant's agreement to return the money and notes; that the Prairie Box Board Company and DaCosta are one and the same, and that the Prairie Box Board Company was only paying its debt and it would form no consideration for the return of the money on whatever condition it may have been paid.

The evidence shows that the contract was made by Charles F. DaCosta and B. F. McKeage, Jr., personally and not as the Prairie Box Board Company in which they were interested, and that the check for $250 received by appellant was the personal check of DaCosta made payable to B. F. McKeage, Jr., and by him endorsed to appellant. The three notes given to appellant were made by the Prairie Box Board Company and endorsed by appellees and were turned over to appellant at the time of the signing of the contract. The claim of the appellant that the contract was without consideration is not supported by

the evidence.

We are of the opinion that the position taken by appellant, that this action was for money had and received, is untenable. The statement of claim, after alleging the contract in question, avers that the Prairie Box Board Company went into bankruptcy within sixty days after the making of the contract. It is further alleged also that B. F. McKeage, Jr., had released to appellant all right to the judgment against the Prairie Box Board Company, and that appellees demanded of appellant the return of the $250 in question and the notes, and that appellant had refused to pay the money or to deliver the notes. The evidence sustains these averments. We think it clear that the action is founded on a breach of the written contract, and the proof fully establishes the averments of the statement of claim. The record shows that appellant had recovered a judgment against the Prairie Box Board Company and was threatening that company with bankruptcy proceedings; and, for the purpose of avoiding the bankruptcy proceedings, the contract in question was entered into and the money paid and the notes given by DaCosta personally and by McKeage, Jr. There is no evidence in the record that DaCosta was the Prairie Box Board Company and that the Prairie Box Board Company was DaCosta, or another name for DaCosta. The Prairie Box Board Company was a corporation and a legal entity; DaCosta was its president and McKeage its secretary and treasurer. These officers were interested in preventing bankruptcy proceedings against the Prairie Box Board Company for reasons which were made known at a conference between the president and attorney of the appellant company and B. F. McKeage and Herman B. Smith, attorney for the Prairie Box Board Company, held for the purpose

of arranging, if possible, some terms of settlement which would enable the Prairie Box Board Company to avoid bankruptcy proceedings and continue its business. Prior to the date of the contract, the Prairie Box Board Company was engaged in manufacturing paper boxes at Morris, Grundy County, Illinois, and appellant had recovered a judgment against that company for coal sold and delivered, and had garnished the Chicago Trust & Savings Bank, thus tying up the funds and bank account of the Prairie Box Board Company, and the agreement in question was entered into for the purpose of releasing the garnishment of the bank and for the purpose of enabling the Prairie Box Board Company to avoid bankruptcy proceedings and continue its business.

It is urged that there was a fatal variance between the statement of claim and the evidence offered in support of it; that the contract was not signed by DaCosta but was only signed by McKeage, and, therefore, it was not the contract of DaCosta. In our opinion, however, the actual signing of the contract by either McKeage or DaCosta was not necessary. DaCosta furnished the money and did everything that he was required to do under the contract. DaCosta accepted it and became bound by the contract as effectually as if he had signed it. Sellers v. Greer, 172 Ill. 549.

The evidence produced on behalf of appellants shows no defense to the action. The court did not err, therefore, in directing the jury to find for the plaintiffs. We find no material error in the record, and the judgment is affirmed.

AFFIRMED.

18973
472 - 18943

COLEMAN GANNON, Appellee,	)	
	)	APPEAL FROM CIRCUIT
vs.	)	
	)	COURT, COOK COUNTY.
CHICAGO RAILWAYS COMPANY, Appellant.	)	

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

This action was brought by appellee, plaintiff in the trial court, and hereinafter referred to as plaintiff, against appellant, defendant in the trial court, and hereinafter referred to as defendant, to recover damages in an action on the case for alleged negligence of the defendant as set out in the declaration of one count.

The declaration avers that on March 4, 1911, defendant operated a street railway on Wells street in the city of Chicago, and the plaintiff, for the purpose of becoming a passenger on a car operated by defendant on said street, took a position at the corner of Wells and Division streets at the usual stopping place, and that thereupon the said car approached and stopped at the usual stopping place at said corner; but defendant so negligently and carelessly managed and controlled the car, that while plaintiff, with all due care and caution, was attempting to get on the car while it was stopped, the car was then and there suddenly started before plaintiff could get safely upon it, and by means of the premises he was thrown down and injured. Defendant pleaded the general issue, and the jury found the issues on the trial for the plaintiff.

The claim and contention of the defendant on the trial was that it had no information or knowledge of the accident at the time of its occurrence, and had no notice

that plaintiff tendered himself as a passenger, and that the plaintiff was injured through his own fault in attempting to board a moving car. The record shows a variance and dispute in the evidence, and between the plaintiff's statement out of court and his testimony on the trial of the case. It was, therefore, indispensable that the jury should be accurately instructed. Swan v. People, 98 Ill. 610; Perkins v. Knisely, 204 id. 275.

Inasmuch as we have decided that the case must be reversed for errors in instructions, we shall not discuss or pass upon the merits of the case. Defendant offered instruction No. 29, which was refused by the court as offered and requested, but the court modified the same. The instruction is as follows, the modification by the court being enclosed within brackets:

> "If you believe from the evidence under the instructions of the court that the defendant had no notice, or in the exercise of ordinary care could not have known, that the plaintiff intended to board said car at the time and place in question, then, if you believe (from the evidence) that plaintiff (failed to exercise ordinary care for his own safety in attempting to board said car, if you believe from the evidence he did so attempt, and) was injured in an attempt to board the said car under such circumstances, you must find the defendant not guilty."

By the modification the court made the instruction turn upon whether or not the plaintiff exercised ordinary care in attempting to board the car notwithstanding defendant had no notice of plaintiff's intention to become a passenger, and notwithstanding that it could not in the exercise of ordinary care on the part of its servants have had such notice. The application of the principle stated in the instruction as requested was to be made only in the event that plaintiff "failed to exercise ordinary care for his own safety in attempting to board said car." The rule invoked by defendant in its offered instruction did not depend upon the condition imposed by the modification. The instruction as tendered by the defendant stated a plain rule of law

that if the defendant had no notice or could not know that plaintiff intended to board the car, then if plaintiff was injured in attempting to board the car under such circumstances there could be no recovery. "To give rise to the relation of passenger and carrier there must be not only an intent on the part of the former to avail himself of the facilities of the latter for transportation, but also an express or implied acceptance by the latter of the former as a passenger." I. C. R. R. Co. v. O'Keefe, 168 Ill. 115; C. & E. I. R. R. Co. v. Jennings, 190 Ill. 475. This principle of law with relation to the contract was ignored and made to depend upon the exercise of ordinary care by the plaintiff, and by the effect of the instruction it had no application to the case unless the jury found that the plaintiff failed to exercise ordinary care for his own safety. In other words, the modification by the court converted the instruction from one which correctly stated the law to the jury into one which stated the law incorrectly and unfavorably to defendant, in that it authorized the jury to draw the inference that so long as plaintiff exercised ordinary care in attempting to get upon the car there could be a recovery even though the defendant had no notice, or in the exercise of ordinary care could not have known, that plaintiff intended to board the car. The instruction should have been given as tendered and the modification by the court was error.

Instruction No. 31 was requested on behalf of defendant as follows:

> "If you believe from the evidence that the plaintiff attempted to board the car in question while the car was moving, then you should find the defendant not guilty."

There was evidence tending to show that the plaintiff attempted to board the car while it was moving. The instruction had a basis in the evidence and states a correct prin-

ciple of law. It is identical with the instruction refused in Kauzlach v. C. G. Ry. Co., 155 Ill. App. 454, except that in this case it relates to a passenger boarding a car and in that case it related to a passenger alighting from a car. In our opinion the instruction should have been given.

For the errors indicated, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

484 - 18955

JAMES S. TRACEY, Appellee, vs. CHICAGO RAILWAY CO., et al., On appeal of CHICAGO CITY RAILWAY COMPANY, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment recovered by appellee, as plaintiff, in an action for personal injuries against defendant, Chicago City Railway Company, appellant.

The declaration contained four counts; on the trial the third and fourth counts were withdrawn by the plaintiff.

The first count alleged that the defendant was a common carrier owning, operating and controlling tracks and cars on a line of street railway along South Halsted street, Chicago; that on December 31,1916, plaintiff was driving a team of horses and wagon in a westerly direction along and upon Halsted street at or near the intersection of 48th street, and while so doing, and while the plaintiff was in the exercise of ordinary care for his own safety, the defendant so carelessly and negligently operated, managed and controlled a south-bound Halsted street car as to cause the same to collide with the wagon. The second count is the same, except that it adds to the allegation of negligent operation in driving the words "at a high rate of speed."

The plaintiff was thirty-four years of age. On the day of the accident he drove his team, the wagon being loaded with lumber, south on Halsted street until he reached about 48th

Place. He then turned his team to the east so that they were headed north on the east side of Halsted street. He claims that he then drove north on the east side of Halsted street and east of both street-car tracks until he reached a point opposite the entrance to the lumber yard of his employer. Plaintiff then turned from a northerly direction to go west into the lumber yard; as the horses drove west across the street, they moved at first at a rate of four miles an hour and later at five miles an hour. The lumber projected three or four feet beyond the rear part of the wagon and the horses were about ten feet in length, thus making the total length of the team and wagon 32 or 33 feet.

The main question in dispute in the case was over the distance north the south-bound car was at the time the wagon started to cross to the west. Plaintiff claimed that the car was several hundred feet - a block or more - to the north when he started to drive west across the tracks. Defendant claimed that the wagon started to drive west at a time when the south-bound car was very near at hand - about 100 feet away.

Error is predicated on erroneous instructions given by the court. Instruction No. 26, requested by the plaintiff and given by the court, is as follows:

> "26. If you find from a preponderance of the evidence that as the car in question approached and crossed 48th street, passengers upon the front platform of said car saw plaintiff's horses in the act of crossing the tracks upon which said car was running, towards the entrance of the lumber yard, and, that the motorman in charge of said car, by the exercise of ordinary care on his part, could have seen said horses in the act of crossing said tracks at the same time said passengers did, then, under the law, it was the duty of said motorman, at said time, to see what his passengers saw.
>
> "You are further instructed that if you find from a preponderance of the evidence that plaintiff's team was in the act of crossing the track on which defendant's car was running, to go into said lumber yard, when said car was approaching or crossing 48th street and that the motorman, in the exercise of ordinary care on his part, could have

known this fact, and that he knew, or could have known, by the exercise of ordinary care, that this car, at the rate of speed it was then running, would strike plaintiff's wagon, and if you further find that by commencing then to control and check the progress of his car, he could have slowed it sufficiently or stopped it in time to avoid striking plaintiff's wagon, and further find from a preponderance of the evidence that he failed, at this time to attempt to control or check the progress of said car, then his failure in this respect was negligence on his part."

This instruction is erroneous. It singles out a particular fact, namely, that certain passengers on the car in question saw the wagon crossing the track when the car was at 48th street, and instructs the jury that it was the duty of the motorman at that time to see what the passengers saw. Furthermore it was a question disputed in the evidence whether or not the crossing of the wagon took place at the time the car was at 48th street, for the police officer, Nugent, and the motorman testified that the horses did not enter upon the south-bound track until the car was about 100 feet north of the place of crossing, which would be at least 50 feet south of 48th street.

The instruction was erroneous in telling the jury what the particular act of appellant's servant must be in order to be within the exercise of ordinary care. That was a matter of fact for the jury and not for the court to determine. West Chicago Street R. R. Co. v. Patters, 196 Ill. 298; I. C. R. R. Co. v. O'Keefe, 154 id. 508.

Another serious ground of objection to the instruction is that it tells the jury that if the wagon was crossing the south-bound track when the car was at 48th street, it was the duty of the motorman at that time to attempt to control or check the progress of the car, and if he did not do so at that time, his failure in that respect constituted negligence. That also was a question of fact for the jury to decide and not for the court to determine as a matter of law. The court by this instruction invaded the province of the jury and committed

reversible error.

The plaintiff also requested, and the court gave, instructions No. 21 and 25, which are as follows:

> "21. It is no defense for the defendant in this case to say its motorman did all he could to avoid the collision in question after he discovered the danger of said collision; if you find from a preponderance of the evidence that by the exercise of ordinary care on his part, he, the motorman, could have discovered that the team was approaching and crossing his tracks, sooner than he testified he did discover it, and could, by exercising such ordinary care, and, sooner discovering that said team was approaching and crossing his tracks, have checked the speed of his car or stopped it, and thus prevented it from striking the wagon. Under the law he is charged with knowing said team was approaching and crossing his tracks, as soon as he could have discovered this fact by exercising ordinary care on his part."
>
> "25. Nor is it a defense that the rails in question, at the time of the collision, were slippery; if the motorman, in the exercise of ordinary care, could have known they were slippery, and could in the exercise of ordinary care on his part after becoming aware that there was danger of striking plaintiff's wagon, have commenced to stop or check the speed of his car sooner than he did, and by so sooner commencing to stop or check the speed of his car, could have prevented the collision. If by exercising ordinary care, he could have known his rails were slippery, then he was bound to take their slippery condition into consideration in determining when to commence to stop his car."

These instructions are erroneous in that they single out particular facts and tell the jury that those facts singly do not constitute any defense when in law they, together with other facts and circumstances, constitute proper matter to be considered by the jury in determining whether or not all the facts and circumstances made out a defense.

In West Chicago St. R. R. Co. v. Petters, supra, the court said:

> "This class of instructions, which select one item of evidence or one fact disclosed by the evidence and state that a certain conclusion does not follow, as a matter of law, from that fact, are calculated to mislead and confuse a jury. * * * * If an instruction of this nature were held proper, it would be possible for the defendant to select each 'mere fact' constituting the entire chain of facts by which negligence was proved, and enable the court to instruct the jury that each of these links in the chain did not, of itself, constitute negligence, and while each

> particular link might not, of itself, constitute negligence, yet the whole, taken together, would , and thereby the court would be enabled to instruct the jury on the facts and take away the consideration of facts from them."

To the same effect are Lindberg v. Chicago City Ry. Co., 85 Ill. App. 433; West Chicago St. R. R. Co. v. Callow, 108 id. 323; Drainage Commissioners v. I. C. R. R. Co., 158 Ill. 353.

The court gave at the request of plaintiff instruction numbered 17, as follows:

> "17. It is negligence for a motorman in charge of a street car to run said car at such a rate of speed that he cannot stop within the distance at which he could, by the exercise of ordinary care on his part, see an obstruction ahead of him on the track."

This instruction is an abstract proposition of law, and as applied to the facts of this case is misleading and erroneous. In the exercise of ordinarycare on the part of the motorman, he might have seen an obstruction on the track not more than ten feet ahead of him because the obstruction might not have been there until the car was within ten feet of it. Yet the instruction says that it would be negligence for the motorman to run the car at such a rate of speed that he could not stop within the distance at which he could see the obstruction, although he might be running at a reasonable rate of speed considering the practical operation of the car. Negligence with reference to a particular case cannot be defined in the broad and short manner of this instruction. It is generally a question of fact except when all reasonable minded men, acting in accordance with the principles of law, would agree that a certain act is negligent when it may be pronounced such by the court as a matter of law. This is not such a case. It was a question for the jury whether it was negligent to drive the car at such a rate of speed that it could not be stopped within the distance that the motorman could see an

object ahead, taking into account intervening obstructions, and the fact that the obstruction may have got upon the track suddenly and unexpectedly, and when the car was very close at hand.

This instruction imposes upon appellant a greater degree of care than the law requires. Appellee was a traveler, using the street in common with appellant. The law in such case is that the parties exercise ordinary or reasonable care to avoid injuring each other. W. Chicago St. R. R. Co. v. Wizemann, 83 Ill. App. 402; Kankakee Electric Ry. Co. v. Lade, 55 id. 454.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

October [illegible]

455 - 18226

PAUL BLOCK, Incorporated, Appellee, vs. FRANK O. BALCH, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The only question presented on this appeal is whether the evidence is sufficient to show that one of the notes, on which recovery was had, was presented for payment to defendant as endorser thereon the date it fell due. The holder of the note testified positively, and it was not denied, that he presented the note on both the day before and the day of its maturity, but that he did not request payment on the former date. While the record shows that in the course of his examination he became somewhat confused as to dates, yet we think the entire testimony, in the absence of any specific denial of the fact in controversy, indicates with sufficient certainty that the note was presented for payment on the date it fell due.

AFFIRMED.

476 - 18947

UNITED STATES BREWING COMPANY OF CHICAGO, a Corporation, Appellant,	)	
vs.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
D. KAVANAUGH'S SONS, a Corporation, Appellee.	)	

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Only one question arises on this appeal,- whether the court erroneously construed the contract sued on. No material fact being in controversy, each party moved for a directed verdict based on its construction of the contract. Plaintiff's motion was denied and defendant's granted. Errors are predicated on such action.

Defendant held and owned a lease to certain premises which it used for saloon purposes, dated December 23, 1902, and running from said date to April 30, 1913, reserving, however, the right to the lessor to cancel the same after May 1, 1910, on giving six months' notice of his purpose so to do. Notice of such purpose was given in September, 1908. Later, in the same month, however, defendant took a new lease to the premises, which provided for a different and larger rental from the date thereof to April 30, 1916, and which reserved the lessor's right to cancel the same after May 1, 1913. On the back of the lease of December, 1902, appears a written consent to its cancellation made two days after the execution of the new lease, signed by the persons who were defendant's president and secretary, which, however, was unnecessary, as the tenant's acceptance of a new lease for the same premises operated in law as a surrender of the old one (Wood Land. &

Ten., Sec. 492; Lyon v. Reed, 13 M. & W. 285.)

In March, 1903, when the lease of December, 1902, was in force, the Brewing Company entered into a contract with the owners thereof to advance them $2000 and furnish them beer, which they were to continue to take during the term of the lease unless it was canceled pursuant to the provision for said option. The contract in question was entered into October 8, 1906. At that time defendant had succeeded to the rights of the owners of the first lease, then in force, and had assumed their obligations to plaintiff under the contract of March, 1903, which is not here involved.

The contract in question recites these facts and the further fact that on the day of its execution, in consideration of the covenants and agreements of defendant therein set out,- one of which was that defendant would continue to buy beer from plaintiff until April 30, 1913,- the Brewing Company had advanced defendant the additional sum of $3000. The contract provided that if defendant kept said covenants and the lease of December, 1902, then in force, was not canceled in pursuance of said provision therein contained, the $3000 so advanced was to become its property; but, if the defendant made default in any of said covenants it was to return a certain proportionate part of said sum. On or about April 30, 1910, (but which to save confusion will be treated as May 1, 1910, the date referred to in the lease), defendant refused to purchase beer of plaintiff any longer.

This action was brought to recover such proportionate sum on the theory that defendant had broken its covenant to continue purchasing beer of plaintiff "to the date of the expiration of said lease," namely, to April 30, 1913.

Defendant's claim that the covenant was not broken

rests upon the contention that on the arrival of May 1, 1910, it was relieved from performance of such covenant because the lease referred to in the contract had been cancelled. But that cancellation was by mutual consent and not in pursuance of the lessor's optional right aforesaid, which he could not exercise until after May 1, 1910, when it no longer existed. At that time the old lease, containing the provision therefor, was no longer in force, and by accepting the new lease defendant was estopped to say that it was (Lyon v. Reed, supra), and no such right could be exercised under the new lease until May 1, 1918. But the contract between the parties was still in force and it obligated defendant to continue to purchase beer of plaintiff until April 30, 1913, unless the tenancy was terminated pursuant to said provision. It was not so terminated,- in fact not terminated at all,- and hence defendant was not excused from performance of its covenant. As the record stands, it was error to direct a verdict for defendant and not to direct one for plaintiff.

The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

October Term, 1912. E.

428 - 18897

In re Estate of MICHAEL FITZ-GERALD, Deceased,- on appeal of JOANNA A. O'BRIEN, Respondent-Appellant, vs. JOANNA A. O'BRIEN, Admrx. Estate of Michael Fitzgerald, Deceased, Appellee, LILLIAN A. REAGAN, Petitioner-Appellee.	Appeal from Circuit Court, Cook County.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

The order appealed from finds that the respondent and appellant, Joanna A. O'Brien, had in her possession a sum of money which belonged to the estate of Michael Fitzgerald, deceased, and the order required that she pay to the administratrix of the estate the amount forthwith. The proceeding originated in the Probate Court, having been begun under the provisions of section 80 of the Administration Act, by the filing of the petition of Lillian A. Reagan, one of the heirs at law of the deceased, requiring the respondent to appear for examination respecting the withdrawal on September 9, 1908, of $4,139.29 from the Savings Department of Hibernian Banking Association, which had theretofore been deposited in the joint names of Michael Fitzgerald and Joanna A. O'Brien. The order entered in the Probate Court was substantially the same as that entered in the Circuit Court, from which latter order this appeal is taken.

On July 3, 1906, there was deposited in the Savings Department of the Hibernian Banking Association the sum of $3,700 to the joint account of the deceased and Mrs. O'Brien, and later a further deposit of $200 made. The agreement made at the time of the deposit is as follows:

"And we, the undersigned, do hereby mutually agree to be and become co-partners in the ownership of all moneys deposited or which may hereafter be deposited to the credit of said account and of all accrued and accruing interest thereon and that upon the death of either of us the moneys then on de-

posit shall become and shall be the property of the survivor; and we do mutually agree and do notify said banking association that each creither of us, the undersigned, or the survivor of us, may, at any and all times, draw and receive from said banking association the whole or any part of said moneys now deposited or which may hereafter be deposited to the credit of said account and that each of us is authorized and empowered to sign our respective names or the name or names of any of us, to any receipt, check, draft or other voucher for the moneys so drawn."

On September 8, 1908, two weeks prior to his death, the deceased requested Mrs. O'Brien, his daughter, to go to the bank and withdraw the money, saying to her, "You won't go down and get it until it is too late and then you will be sorry for it." Mrs. O'Brien took her niece, the granddaughter of the deceased, Miss Powell, to the bank and withdrew substantially all the money there on deposit, leaving in the bank $1.29. The money was handed to the decedent by Mrs. O'Brien in the presence of Miss Powell. The testimony of Miss Powell was taken at the hearing, and upon it depends in a large measure the decision of the case. She testified that Mrs. O'Brien handed the money to her grandfather; that he took it, looked at it and said, "Here, take it and keep it"; that this was after the last rites of his church had been administered to the decedent; that Mrs. O'Brien took the money and handed it to the witness, who placed it in a drawer and gave it back to Mrs. O'Brien the day after the funeral.

We are of the opinion that the delivery of the money by the deceased to Mrs. O'Brien, taken in connection with the words used and the facts and circumstances as disclosed in the record, constituted a gift.

It is admitted that the decedent was in full possession of his mental powers at the time and prior to the occurrence related. It is argued by the appellee that as the deposit under the so-called "partnership agreement" would by the terms of that agreement belong to Mrs. O'Brien after his death, there was no reason why he should insist that the money be brought to him, unless it was that he did not want Mrs. O'Brien to become the posses-

ser of it after his death.

We think the argument untenable, for the reason that if it was the intention of the decedent that Mrs. O'Brien should not have the money after his death it would have been more natural for him either to have deposited it in another bank where he had a personal account subject to check, or to have put it in the hands of some third party. He would not have handed it to Mrs. O'Brien, telling her to take it and keep it. We are persuaded that when he said to her to go down and get the money, telling her in effect that if she did not do so she would be sorry, he had doubt as to whether the co-partnership agreement would effectuate his intention, and, knowing his family as he did, he might reasonably have expected that Mrs. O'Brien would have trouble with the others over the matter; having these ideas in mind, he thought to put it beyond any possibility of question by giving the money to her, so that possession and ownership of it might absolutely be in her before his death.

We are so convinced that the gift was absolute that we find it unnecessary to consider the distinction suggested in the briefs between a gift inter vivos and a gift causa mortis.

The judgment of the Circuit Court will be reversed and the cause remanded, with direction to the Circuit Court to enter an order discharging the respondent.

REVERSED AND REMANDED,

with directions.

506 - 18977

ELIZA F. KENDALL, Appellee, vs. CHICAGO RAILWAYS COMPANY and CHICAGO & OAK PARK ELEVATED RAILROAD COMPANY, Appellants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

Judgment in this case was rendered against the two appellants in the sum of $5000, for personal injuries alleged to have been sustained by the appellee as the result of a collision between a car of the Chicago Railways Company, in which the appellee was riding as a passenger, and a train of the Chicago & Oak Park Elevated Railroad Company, at the intersection of their tracks in the City of Chicago, the tracks of both companies being on the surface of the ground at the point of intersection.

While it was contended by the Railways Company at the trial that the accident was due to no negligence on its part, it is now conceded by it that the verdict of the jury so far as the defendant's liability for some amount is concerned should not be disturbed as being against the weight of the evidence. On the part of the Elevated Railroad Company it is insisted as one of the grounds for reversal that the verdict against it is against the manifest weight of the evidence and that it should not be held liable for any amount. Both appellants complain of rulings of the court on the admission of evidence; that the court erred in giving certain instructions and in refusing to give others; that the damages allowed are excessive.

After careful perusal of the record we are of the

opinion that the case properly should have been submitted to the jury, as was done, with reference to both defendants.

It is contended by both appellants that although the appellee testified that she was thrown to the floor striking her head and shoulders, after having first struck against the seat in front, she was not corroborated and that witnesses who were in a position to observe her testified they did not see her fall; that she made no immediate claim of any injury and bore no visible marks of violence before reaching her home. It is not shown in the record that a doctor was immediately called in, but she appears to have been treated by one some time after the accident, how soon the doctor was unable to say.

The amount which the plaintiff was entitled to recovered depended to so large an extent upon the testimony of expert medical witnesses that it was very important that the rules of evidence respecting such testimony should be observed. One of the rules is that " a physician, when called as a witness, who has not treated the injured party but has examined him solely as a basis upon which to give an opinion in a trial to recover damages for the injury, cannot testify to statements made by the injured party to him or in his presence during such an examination or base an opinion upon the statements of the injured party." Greinke v. Chicago City Railway Co., 234 Ill. 564; Shaughnessy v. Holt, 236 Ill. 485. This rule, it is conceded by the appellee, was violated in the examination of Dr. Cox, one of the appellee's witnesses, but it is said the error was harmless.

It was claimed by appellants that all of the ailments complained of by the appellee were due to other causes than the accident. The case of Fuhry v. Chicago City Railway Co., 239 Ill. 548, cited by appellee, is not in point. In that case, although the doctor was examined as an expert, he

was also the attending physician, and the opinion contained a restatement of the rule heretofore referred to.

The court charged the jury that if the defendant Elevated Railroad Company failed to provide a flagman at the intersection in question, as required by section 3177 of the ordinance, and that its failure to do so caused or proximately contributed to cause the accident in question, and if they further believed from the evidence that the plaintiff was in the exercise of ordinary care, then they should find the defendant Elevated Railroad Company guilty. This instruction was erroneous. No count of the declaration charged negligence in failing to provide a flagman as provided by this ordinance. C. C. & I. C. Ry. Co. v. Troesch, 68 Ill. 545. At the time of the accident the gates at the intersection were not in operation, it being impossible to use them on account of work being done by both of the appellants on their tracks at that point, which was rendered necessary by the elevation of the Chicago & Northwestern Railway Company tracks nearby, and the lowering of the grade on Pine avenue under the viaduct. The gates were not relied upon, therefore, by the employes of either company, but the record tends to show that at the time of the accident, which was during the noon hour, the flagman of the elevated road was at his dinner and a police officer and the flagmen of the Railways Company were at the crossing. The evidence also tended to show that the proximate cause of the accident was an improper signal given by the policeman. The giving of the instruction was prejudicial error.

The plaintiff was a passenger of the Railways Company and not of the elevated Railroad Company. We think, therefore, that the following instruction, which was tendered by the Elevated Railroad Company and refused, should have been given:

"58. If you believe from the evidence and under the instruction that the motorman of the Chicago and Oak Park Elevated Railroad Company, in charge of the car in question that collided with the car of the Chicago Railways Company on the occasion in question, on approaching the place of the accident in question received a signal from the signal man or man in charge of said crossing to come on or come ahead over said crossing and that in response to said signal he attempted to pass over said crossing and that in approaching said street intersection and attempting to pass over the said crossing he was in the exercise of ordinary care up to the time of the collision in question, then the plaintiff cannot recover against the defendant, Chicago and Oak Park Elevated Railroad Company on the ground of negligence on the part of its said motorman."

Testimony was improperly allowed to be introduced with reference to another accident sustained by the appellee after the occurrence of the accident on account of which this suit is brought, and the court refused to instruct the jury that she was not entitled to recover any damages for such subsequent accident. We think the testimony was incompetent and, as it had been improperly admitted, the instruction should have been given in order to correct any erroneous impression the jury may have obtained.

For the errors enumerated the judgment is reversed and the cause remanded for a new trial,

REVERSED AND REMANDED.

393 - 18438.

LYMAN W. ROGERS, for the use of Edward J. Ader, Appellee, vs. CHARLES E. ROLLINS and ARCHIBALD O. BURDICK, Appellants.	APPEAL FROM COUNTY COURT, COOK COUNTY.

MR. PRESIDING JUSTICE GRAVES DELIVERED THE OPINION OF THE COURT.

On or about May 26, 1910, appellee applied to appellants to procure for him a policy of insurance with the Underwriters at Lloyds in London, hereinafter called the Underwriters, on an automobile for the sum of $3,000 against loss by fire and certain other specified means. He paid to appellants $90, in return for which they gave him a paper called a binder or binding receipt, the preamble to which reads, in part, as follows:

"Whereas, Lyman W. Rogers, of Chicago, Illinois, hereinafter called the Assured, has paid the sum of $90.00 Premium or Consideration to us for a Policy of insurance with the Underwriters at Lloyds London, for an amount of $3,000 this Binding Receipt is to insure and cover*****".

Then follows a description of the automobile and the things insured against and certain other stipulations, and then the receipt contains the following:

"The said insurance commencing with noon of the 26th day of May, 1910, and ending with noon of the 26th day of May, 1911.

"This Binding Receipt is issued pending the delivery of the Policy, when this Binding Receipt becomes null and void.

"This Binding Receipt is also issued subject to the representations made in the application furnished to us and said application is to be considered as forming a part of this Binding Receipt."

On June 7, 1910, before any policy issued by the Underwriters at Lloyds in London was delivered to the insured

and while the binding receipt was still in force, the automobile was destroyed by fire. After the fire and before the loss was adjusted the policy of the Underwriters which was to take the place of the binding receipt arrived and was delivered to appellee. Proof of loss was duly made in writing signed and sworn to by appellee, and, together with the Underwriters' policy, was delivered to the adjuster. Later, both the policy and proof of loss were delivered to appellants and by them sent to Morgan, Lyons & Company, agents in London for the Underwriters. In the proof of loss the total cash value of the automobile was stated to be $900, and a claim for loss in that amount was made by appellee. In this proof of loss appellee also stated that he was the owner of the automobile when it was destroyed, and that no other person had any interest in it. The loss having been adjusted on the basis of the proof of loss and claim, $900 was placed in the hands of appellants by Morgan, Lyons & Company, agents in London of the Underwriters, to pay the loss. In the meantime an instrument in writing purporting to assign to Edward J. Ader the policy of insurance of the Underwriters, and all sums of money due or to become due to appellee thereunder had been executed by appellee and delivered to Edward J. Ader. After the money to pay the loss had been placed in the hands of appellants one William Ader, a brother of Edward J. Ader, took the assignment referred to to appellants and he testified that he was told by them that, unless it was cancelled they could not pay the loss to appellee. Appellant, Charles E. Rolling, testified that William Ader said they had decided to let Mr. Rogers collect the claim and requested that the same be paid to him. Whatever the truth is in that regard, William Ader then wrote the words, "cancelled, Edward J. Ader, William Ader", across the assignment and delivered it to appellants, and it was arranged that Ader and appellee should return to appellants'

office at 3 o'clock on that afternoon, which they did, but appellants did not deliver the money to appellee or to Ader, then or at any time, but did have a conference with appellee in which he told them that he was not the owner of the automobile at the time it was burned and never had been; that he had sworn falsely to the proof of loss; that he had purchased the automobile with money furnished by Ader; that he was sorry he had gotten into the "proposition" and was tired of being used for somebody else's benefit; that he thought the fire that destroyed the automobile was suspicious; that he thought the claim was fraudulent; that he would have nothing more to do with it and that he would not accept the money from the Underwriters. The evidence as to these statements of appellee in derogation of his own title was introduced by appellants and so far as the abstract shows no objections to the introduction was made, and no cross errors are assigned on this record. After this conference with appellee, appellants returned the draft for the $900 to Morgan, Lyons & Company and gave to them as a reason therefor that appellee had refused to accept the money. Since that time appellee appears not to have taken any further active interest in the matter.

The original declaration filed in this case contained three counts. It was averred in the first count that appellants issued to appellee the binding receipt which is set out <u>in haec verba</u>; that when the binding receipt was issued and when the loss occurred appellee was the owner of the automobile in question; that the same was destroyed by fire; that appellee delivered to appellants the proper proof of loss verified by him; that subsequently the loss was adjusted at $900 and that appellants then promised to pay to appellee that amount, but failed so to do.

The second count is substantially the same as the first, except that the binding receipt is set out, in sub-

stance and effect, instead of being set out in haec verba and instead of the averment of a new promise to pay after the adjustment of the loss, it is averred that the binding receipt was then still in force.

The third count is for money had and received by appellants for the use of appellee.

The original declaration was twice amended. The first time the words "for the use of Edward J. Ader" were added after the word plaintiff in the opening sentence of the declaration. By the second amendment, it is averred that the binding receipt and all rights under it was on August 13, 1910, sold, assigned and transferred to Edward J. Ader, and that the said Edward J. Ader then and there acquired title to the same from appellee. How the assignment was made is not averred.

Appellants filed a plea of the general issue to each count of the declaration. The verdict of the jury and the judgment entered thereon was against appellants for $900.

There is no competent evidence in the record of any authority in William Ader to cancel the assignment of the policy of insurance offered in evidence and both William and Edward J. Ader expressly deny in their testimony that he had any instructions or authority so to do. William also testified that he did it at the suggestion of appellant, Rollins, and that Rollins then said to him, referring to the assignment, "Mark it cancelled and give it to me and I will give you the check." This evidence that the act of William Ader in writing the word cancelled on the face of the assignment was unauthorized being uncontradicted must be taken as true and the so-called cancellation must be disregarded in the determination of this case.

If Lyman W. Rogers to whom the binding receipt sued on was issued is to be treated as the real appellee and party

in interest, it is clear he has no right to recover, because the uncontroverted evidence shows that he expressly disclaimed to have ever had any insurable interest in the property insured or any right to the money to be paid in adjustment of the loss and that he refused to receive the same from appellants or any one else.

If Edward J. Ader, the assignee of the policy of insurance, is to be treated as the real appellee and party in interest, and appellants have treated him as such in their argument, he can not recover under the first or second count of the declaration, because the right to recover rests in each of those counts on a supposed assignment of a binding receipt issued to Rogers, and there is no proof that any "binding receipt" was ever assigned to any one.

If the assignment offered in evidence could be construed to be an assignment of anything covered by the averment, "all sum or sums of money, interest, benefit and advantage whatsoever, now due, or hereafter to arise or be had or made by virtue of said insurance," still no recovery could be properly had under the first or second count of the declaration, because all obligations under the policy of insurance are obligations of the Underwriters at Lloyds and they are not parties to this suit.

It follows that if any recovery can be sustained under this declaration, it must be under the count for money had and received and on the theory that appellants had in their hands moneys which in equity and good conscience they should have, but which they failed to deliver to Ader, the assignee. Under such circumstances the law implies a promise to pay, although there is no privity between the parties. Schoden v. Sheffer, _____ Ill. App., _____ (opinion filed December 31, 1913); Morris v. Jamieson, 99 Ill. App., 32; Nicholson v. Moloney, 195 Ill., 575; Donovan v. Purtell, 216 Ill., 639;

Highway Commissioners v. Bloomington, 253 Ill., 164.

That appellants had in their possession $900 of the money of the Underwriters at Lloyds to pay the loss as adjusted, under the policy of insurance issued by them in pursuance to the terms of the binding receipt issued to appellee by appellants, and that they failed to pay the same over either to Rogers or Ader, but returned it to the Underwriters at Lloyds is undisputed. It also is undisputed that the insured, Rogers, did on August 13, 1910, and before the money to pay the loss came into the hands of appellants, assign to Ader the Underwriters'policy and that appellants had notice of such assignment while the $900 of the underwriters was in their hands.

The only reasons urged by appellant why recovery can not be had under the count for money had and received are, First, because "indebitatus assumpsit for money had and received will not lie to recover upon an adjustment of a claim for insurance under a policy of insurance"; that "after a loss is adjusted, the suit is on a new promise."

Second, because "there can be no new promise to pay for an adjusted insurance loss, unless there was first an original contract or promise to insure."

It is a sufficient answer to these contentions to say this count of the declaration does not rest on the new contract to pay the loss implied from the act of adjusting it. The Underwriters through Morgan, Lyons & Co. had not only adjusted the loss, but they had sent the money to pay the loss to appellants. This third count is based on the claim that Rogers, the nominal appellee, was in equity and good conscience entitled to have appellants pay the $900 over to him for the use of his assignee, Ader; that the money was in the hands of appellants for that purpose.

Appellants contend that the money was sent to them to be paid to the insured only on condition that they wished to do so; that if they should find out that there was anything in their judgment suspicious or fraudulent they were to return the money to the Underwriters. In support of this theory appellant, Charles E. Rollins, testified that Mr. Lyons of Morgan, Lyons & Co., while in Chicago some four or five years before had so instructed appellants. It is, however, perfectly clear that this loss was not handled in pursuance to such arrangement. The letter to appellants sent by Morgan, Lyons & Company concurrently with the money, in part, reads:

"We note what you say as to the delay in forwarding Proof and now have pleasure in sending you under separate cover credit note for £191. 1s. 10d in settlement of this loss, plus the adjusting fee of $38.10 which amount we have placed to the credit of your account. As this is a total loss, we are retaining the policy in our office for the purposes of our records."

The terms of this letter are explicit. The money is sent "in settlement of this loss". There is no proviso or limitation hinted at. The letter in which appellants returned the money to Morgan, Lyons & Co. states why it is returned. The reason why it is returned is expressly stated. There is no hint in it that any "suspicious" circumstances had in any way influenced them in returning it. It reads:

"September 29, 1910.

Messrs. Morgan, Lyons & Co.,
London, England.

Gentlemen:

The assured under London Lloyds Automobile policy No. M 63047, Mr. Lyman W. Rogers, has refused to accept any money in payment of this loss. We are, therefore, returning to you your credit memorandum for $981, the amount of the loss. We have paid adjustment bill of D. S. Wagner and hand you his receipt herewith.

Kindly acknowledge receipt, and oblige,

Yours very truly."

The letter of Morgan, Lyons & Co. to appellants, acknowledging the return of the money again recognizes the

fact that the money was returned for the sole reason that Rogers refused to accept it. It reads:

Messrs. Rollins & Burdick,
Chicago, Ill.
Dear Sirs:
Lyman W. Rogers, Policy No. M63247.
We have for acknowledgment your favor of the 29th ult. advising us that the assured under this policy has refused to accept any money in payment of the recent loss which Underwriters settled, and returning our credit memorandum for $981. Mr. Wagner's receipted bill for adjusting fee also came to hand.
We are holding same pending further developments in this case, and are,
Yours faithfully,
Morgan, Lyons & Co.,
Pr. A. E. Ruehle."

We think the jury were warranted in finding that the money was sent to appellants unconditionally to pay the loss.

The assignment offered in evidence purports to sell and convey to Edward J. Ader not only the insurance policy of the Underwriters, but "all sum or sums of money, interest, benefit and advantage whatsoever now due, or hereafter to arise, or to be had or made, by virtue thereof". The money sent by the Underwriters to appellants to pay this loss is clearly within the terms of the assignment and belonged to Edward J. Ader. He was the equitable and bona fide owner of it. He could maintain an action for it in his own name under section 18 of the Practice Act, or in the name of his assignor for his use. He chose the latter course and is the real party in interest.

Upon the trial appellants introduced evidence of statements made by Rogers, the nominal appellee, after the assignment of the policy of insurance to Ader to the effect that he never owned the automobile that was insured. The court later instructed the jury, in effect, that the statements made by Rogers after the assignment of the policy to Ader in derogation of his, Rogers', title to the policy were not competent evidence in the case and should be disregarded by the

jury. Appellants complain of this instruction not because the law is not correctly announced, but because the evidence excluded was admitted without objection and because appellee introduced evidence to contradict it. The point is not well taken. The instruction amounted to a withdrawal from the consideration of the jury of confessedly incompetent evidence and was properly given.

Another instruction on the question of what facts constitute a cause of action for money had and received is complained of. The instruction is inaccurate in some of the respects complained of, but the inaccuracies were of such a character as to impose upon appellee the burden of proving facts not necessary to his right of recovery. The instruction was more favorable to appellants than it would have been with the elements complained of omitted and, therefore, could have done them no harm.

Another instruction announced the law to be that after a loss of insured property has been adjusted a suit against the insurers is on a new promise, and that the adjustment is a waiver of all defenses known at the date of the adjustment. The instruction states an abstract proposition of law as applied to suits against the insurer. This is not a suit against the insurer. The instruction should not have been given, but we are unable to see how appellants could have been harmed by it.

Appellants complain that the conduct of counsel for appellee during the trial was such as to be calculated to prejudice appellants' rights. Although the matters complained of have not been properly preserved for review in this court, we have examined the record and find nothing that in our judgment could have influenced the verdict of the jury to the detriment of appellants.

It is lastly insisted that the court erred in admitting in evidence the assignment of the policy of insurance by Rogers to Ader, for the reason that the assignment averred in the first and second counts of the declaration was an assignment of the binding receipt and not of the policy of insurance. Under the third count for money had and received it was necessary for appellee to show that he was in equity and good conscience entitled to the money sent by the Underwriters to appellants to pay this loss. The assignment in question was properly admitted in evidence for that purpose.

Finding no reversible error the judgment of the county Court is affirmed.

JUDGMENT AFFIRMED.

321 - 18361.

MARIE CASPER, a minor, by MATHEW CASPER, her next friend, Appellee, vs. ANDREW GECK and EMIL GECK, Appellants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE BAUMS DELIVERED THE OPINION OF THE COURT.

This is an action in case brought in the Circuit Court by Marie Casper, a minor, by her next friend, against Andrew Geck and Emil Geck, to recover damages for personal injuries, wherein a trial by jury resulted in a verdict and judgment against the defendants for $4,000, to reverse which judgment they prosecute this appeal.

The declaration contains six counts.

The first count alleges that on April 28, 1910, the defendant, Emil Geck, owned and operated a grocery store, with the knowledge and consent of the defendant, Andrew Geck, at No. 5702 South Ashland avenue; that said Andrew Geck then owned, controlled and operated certain improved real estate known as Nos. 5700 and 5702 South Ashland avenue; that said premises were improved by a large brick building consisting of stores and flats, and that the first floor at said No. 5702 was occupied by the defendant, Emil Geck, as a grocery store, and that the basement or cellar thereunder was used in connection with said building; that there was an opening or entrance into said basement in the public sidewalk in front of said No. 5702, which opening or entrance had attached thereto on the north and south sides thereof iron doors or sidewalk lifts or covers by which said opening or entrance was closed;

that the defendants were in possession of, used, managed and operated said opening or entrance in front of said building and said iron doors attached thereto, which said opening or entrance and the said doors attached thereto, were of such character as to be attractive to children of tender years and which were dangerous for children to play with, upon or around, which fact was known to the defendants, or in the exercise of ordinary care and caution might have been known to them; that said building at No. 5702 South Ashland avenue is located in a thickly settled and populated district in the City of Chicago; that at the time and place aforesaid, the defendants carelessly and negligently permitted and allowed said opening or entrance in front of said building to said basement to be and remain open, unguarded, exposed, uncovered and unprotected and easy of access, said opening or entrance not being used at that time; that at said time the plaintiff was, to-wit; five years of age; that the plaintiff, while in the exercise of ordinary care and caution for her own safety for a child of her age, was coming out of said grocery store and while at or near to said opening or entrance which was then and there open, uncovered, exposed, unguarded and easy of access and said doors, sidewalk lifts or covers being open and standing upright one of the said iron doors, fell or closed down upon plaintiff's right leg, and by and in consequence of the carelessness and negligence of the defendants as aforesaid, the plaintiff was then and there and thereby permanently injured, etc.

The second count is like the first save that it omits the element of attractive nuisance. The third count predicates a right of recovery upon a violation by the defendants of an ordinance of the City of Chicago, as follows:

"That it shall be unlawful for any person, firm or corporation owning or using any coal hole, sidewalk lift, outside stairway or other opening in any public sidewalk, to allow the same to remain uncovered or opened, except while the same is

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actually being used for the purpose of entrance or exit, or for the purpose of introducing or removing any article through such opening."

The fourth count charges the defendants with negligence in opening and in permitting said opening or entrance to be and remain open and unguarded for an unreasonable length of time. The fifth count charges the defendants with negligence in permitting said opening or entrance to be and remain open and unguarded for an unreasonable length of time.

The additional count charges that the defendants owned, controlled, managed and operated said opening or entrance to said basement and said iron doors, attached thereto, which were of such character as to be attractive to children and which were dangerous for children to play with, upon or around; that said No. 5708 South Ashland avenue was located in a thickly settled and populated district of the City of Chicago; that the defendants carelessly and negligently permitted and allowed said entrance or opening, while not being used, to be and remain open and unguarded and easy of access, so that plaintiff, while in the exercise of ordinary care and caution for her own safety, for a child of her age, and while playing upon, around and about said entrance or doors, said doors, sidewalk lifts or covers fell and closed down upon plaintiff's right leg and by and in consequence of the carelessness and negligence of the defendants as aforesaid, the plaintiff was then and there and thereby dangerously and permanently injured, etc.

The uncontroverted material facts are substantially as follows: Prior to and at the time in question the defendant, Andrew Geck, was the owner of a two story brick building situated at the corner of 57th street and Ashland avenue, known as 5700 and 5708 South Ashland avenue. The main part

of the first story was divided into two store rooms and all of the second story, and a portion of the first story was divided into flats, one of which was occupied by Andrew Geck. The store room known as No. 5705 was occupied as a grocery store and meat market, and the living rooms in the rear of said store were occupied by the defendant, Emil Geck, a son of Andrew Geck. The entrance to the basement beneath the grocery store was by a stairway leading from the sidewalk in front of the store, about 2 or 3 feet north of the stone step at the front door of the store. The basement stairway was provided with two iron doors, each two feet in width and five feet in length, hinged at the sides and closing together in the center of the stairway, so that, when closed, they were flush with the surface of the sidewalk. Each of the iron doors weighed 125 or 150 pounds, and when open they stood nearly perpendicular, the north door being supported by a stick, one end of which rested on the sidewalk, and the south door usually being supported by the step in front of the door leading into the store. On the afternoon of April 28, 1910, the plaintiff, a girl aged 4 years and 11 months, accompanied her sister, aged about 7 years, to the grocery store, where the latter had been sent to purchase some groceries. The iron doors in question were then open, and had been open most of the day. Upon leaving the store, the plaintiff immediately preceded her sister, and when she reached the basement stairway she put her hand on the south iron door, which then fell upon her right knee, pinning it to the sidewalk, thus causing the injury complained of.

The evidence does not disclose the precise position of the iron door when then open, but it is a physical impossibility that the plaintiff, by the exertion of her little strength, could have lifted the door weighing 125 pounds, as it would have been necessary for her to do in order to close

the door, if it had been resting in an oblique position against the stone step at the front door of the store. The inference is irresistible that the door was standing open in practically a perpendicular position, so that the slightest contact with it would shift its center of gravity and cause it to fall.

We proceed to a consideration of the errors assigned in the order in which they are argued by counsel.

At the instance of the plaintiff the court gave to the jury an instruction as follows:

"If you find from the evidence in this case that the hole or entrance and iron doors in question in this case were on or partly on private property and under the control of the defendants, then you are instructed that if the thing that caused the injury, if any, was in the possession or used by the defendants, before and at the time of the accident and was left exposed and unguarded and was of such a character to be an attraction to the plaintiff, appealing to her childish curiosity and instincts and on, alongside of or near to the public highway and that the defendants knew said hole or entrance and the doors thereon were attractive to children of tender years, or, by the exercise of ordinary care, might have known them to be attractive to children of tender years, and did not use ordinary care to keep said hole or entrance and the doors thereof in question in a condition so as not to injure plaintiff, then your verdict should be for the plaintiff, if the plaintiff was injured as charged in her declaration, or any count thereof."

It is insisted that this instruction was erroneous, first, because there is no proof tending to show that the entrance and doors in question were of a character attractive to children, or that prior to the accident children had been in the habit of resorting to said place to play; second, because there was no fact or circumstance inherent in the character of the premises which tended to support the first count of the declaration; and, third, because it appears from the evidence that the plaintiff was not allured to the place in question by its attractiveness, but that she went to the store with her elder sister to purchase goods.

It is not necessary for us in this case to determine whether or not, as a matter of law, the opening in the side

walk and the stairs therein leading to the basement were sufficiently attractive to entice children of tender years into danger, because contrary to the insistence of the defendants, there is ample evidence tending to show that prior to the accident in question the defendants frequently saw children playing in and about the entrance to the basement, and that one or both of the defendants had on several occasions warned children of the danger of so doing, and ordered them away from the entrance and stairway. Whether or not the defendants, or either of them, were guilty of negligence in the respect stated was a question of fact for the jury. City of Pekin v. McMahon, 154 Ill., 141; Siddall v. Jensen, 168 Ill. 43; True Co. v. Woda, 201 Ill., 315; Stellery v. Cicero St. Ry. Co., 243 Ill., 390.

There is no force in the insistence that because the occasion of her presence at the place in question was to accompany her sister to the grocery store, it can not be held that plaintiff was allured to the place by its attractiveness. The mission of the plaintiff to the grocery store was a perfectly legitimate one, and in going to and returning from the grocery store, she was necessarily obliged to use the side walk in which the open entrance and stairway to the basement were maintained within two or four feet of the entrance to the store. Under the evidence in this case bearing upon the question of the attractiveness of the open entrance and stairway to children of tender years, the fact that such open entrance and stairway were maintained in the public sidewalk served to emphasize the duty imposed upon the defendants or either of them to exercise reasonable care to see to it that the opening was kept properly guarded or closed. The fact that the plaintiff was allured by the attractiveness of the place in question while returning from the grocery store

has no more significance as affecting the liability of the defendants or either of them than if she had been so allured while engaged in play upon the side walk or while upon the side walk for any other purpose.

It is next urged that the injury to the plaintiff was occasioned, as appears from the evidence, not by reason of the negligence of the defendants or either of them, but by reason of the independent act of the plaintiff in taking hold of the door, which act must be held to be the sole proximate cause of the injury. In its application to the facts in this case this contention of the defendants amounts merely to an attempt on their part to defeat a recovery upon the ground that the plaintiff was guilty of contributory negligence. As the plaintiff was less than seven years of age, the defense of contributory negligence, if any, of the plaintiff as a bar to a recovery, is not available to the defendants. The open iron door was a constituent part of the attractive nuisance or dangerous thing in question, and the defendants or either of them were chargeable with knowledge that a child who is attracted by the opening and stairway might casually or otherwise take hold of the upright iron door and thereby cause it to fall. The case of Seymour v. U. S. Y. & T. Co., 224 Ill., 579, cited and relied upon by counsel for the defendants is clearly distinguishable from the case at bar. In the Seymour case the injury complained of was occasioned by an instrumentality wholly independent of the alleged attractive nuisance.

Error is assigned upon the action of the court in refusing to give the following instruction offered by the defendants:

"The court instructs the jury that if you believe from the evidence in this case that the owner of the building constructed a stairs leading to the basement of his building

with doors at the opening of the stairs upon the sidewalk, and the said stairs is connected with and used only in that part of the building in the exclusive possession of the tenant and the doors and the covering were in good and safe condition when the owner or landlord delivered possession of the said premises to the tenant, then and in that event, the tenant and not the owner or landlord is responsible for the injuries occasioned by the neglect or failure to keep the covering or the doors covering the stairs leading to the basement closed or guarded."

The main controverted question of fact in the case was whether or not Andrew Geck, the owner of the building, was in possession or control, jointly with his son, the defendant, Emil Geck, of the store room or of the basement beneath the same. The instruction in question was properly refused, because it assumes that the portion of the building in question was in the exclusive possession of the tenant, and that the owner or landlord delivered possession of the portion of the premises in question to the tenant. The rule of law sought to be announced by the refused instruction was sufficiently and properly covered by the fourth instruction given at the instance of the defendants.

It is said: "The court admitted in evidence over the objection of the defendants an ordinance reading as follows:

'That it shall be unlawful for any person, firm or corporation owning or using any coal hole, sidewalk lift, outside stairway, or other opening in any public sidewalk, to allow the same to remain uncovered or open, except while the same is actually being used for the purpose of entrance or exit, or for the purpose of introducing or removing any article through such opening.'"

No reason is assigned or argument advanced in support of the objection to the admission of the ordinance in evidence and such objection must, therefore, be held to be waived in this court, but it is specifically urged that the court erred in instructing the jury respecting the effect of said ordinance as follows:

"If you find from the evidence in this case that the hole or entrance and the doors thereon in question in this case

were at the time of the accident in part in the public sidewalk and at the time uncovered or open and was not actually being used at that time by the defendants, or by one of them and that the defendants used and had control thereof, and if you further find that the plaintiff was injured as charged in plaintiff's declaration, then your verdict should be for the plaintiff."

The only objection urged to this instruction is that it improperly fails to inform the jury that the defendants would not be liable under the ordinance if at the time in question the opening or entrance into the basement was being used for the purpose of entrance or exit or for the purpose of introducing or removing any article through such opening by any person or persons other than the defendants or either of them. It is said: "The jury might have found or reasonably inferred that the doors were open by reason of the entrance being used by some third person delivering goods to the defendant or carrying away goods from the defendant's basement or that the doors were opened by any one of several persons or classes of persons who might have lawful occasion to enter said basement." If the instruction may be said to be erroneous in the respect urged the error was wholly harmless. There is no pretence that at the time in question the opening was being used for any purpose by the defendants or either of them and it affirmatively appears from the evidence that at the time in question no person or persons were at or near the opening, except the plaintiff, her sister Lucy, William Greener, a passer-by whose attention was attracted by the cries of the plaintiff, and an unknown chauffeur, who, while driving by on the street was also attracted by the cries of the plaintiff and who stopped his machine and went to her relief.

While the preponderance of the evidence tends to show that the retail grocery business in the store room of the building owned by the defendant, Andrew Geck, was being con-

ducted in the name of the defendant, Emil Geck, the evidence further tends to show that the defendant, Andrew Geck, was frequently employed in the store in various capacities; that he assumed the duty and responsibility of warning children of the danger of playing in and around the open entrance and stairway to the basement, and ordered the children to keep away; that during the time in question he was engaged on his own account in the wholesale fruit and vegetable business and used the basement beneath the store room for the storage of fruits and vegetables and in the conduct of his business. The finding by the jury that the defendants were jointly in possession and control of the premises in question was not unwarranted.

It is finally urged that the damages awarded by the jury are excessive. It is uncontroverted that the injury to the plaintiff's right knee and leg is serious and permanent; that the injured limb is smaller and shorter than the other, and that such shortening will increase as plaintiff grows older and larger; that the circulation and nerve supply are permanently impaired; that plaintiff cannot use her injured limb normally in walking, but drags it more or less; that as a consequence of her injury there will be a deformity of the pelvic bones. In view of the character and permanency of the plaintiff's injuries we do not regard the damages awarded as being more than compensatory. A consideration of the errors assigned and argued discloses no ground for reversing the judgment and the same is, therefore, affirmed.

JUDGMENT AFFIRMED.

338 - 13378.

DANIEL W. MELLON, A Appellee,
vs.
CONRAD SEIPP BREWING COMPANY, Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE BAUNE DELIVERED THE OPINION OF THE COURT.

This is a bill in equity filed in the Circuit Court by appellee against appellant for an accounting and for a cancellation of a certain assignment by appellee to appellant of a dram shop license and for a return of said license to appellee. Upon issues joined the cause was referred to a master to take and report the proofs with his findings. The report of the master was approved by the chancellor and a decree was entered in substantial conformity with the master's findings and recommendations. The decree finds the dramshop license in question and the renewal right thereto to be of the market value of $2,200; that the said license and the renewal right thereto is in the possession of appellant as the property of appellee and belongs to appellee; that appellee is indebted to appellant in the sum of $377, with interest, from October 28, 1908, which indebtedness should be deducted from said sum of $2,200. It is therein, therefore, adjudged and decreed that appellant pay to appellee $1,833, and that in default of such payment execution issue therefor.

No question of law respecting the dram shop license in question, or relating to the ordinance under which the same was issued, is raised by appellant, and it is not contended that the master misapplied the law to the facts as found by him.

Objections, if any were filed by appellant, to the

master's report do not appear in the abstract of the record or in the record itself, and although the decree recites that the objections to the master's report stood as exceptions thereto on the hearing before the chancellor, such exceptions are not preserved in the record.

As the only questions raised by appellant upon the record relate to the findings of the master, as embodied in the decree, upon the issues of fact involved, the absence of any objections and exceptions to such findings precludes a review of such questions on this appeal. Beck v. Stoddard, 118 Ill. App., 570; Boylan v. Cameron, 156 Ill. App., 432; Von Platen v. Winterbotham, 303 Ill., 198.

The decree is affirmed.

DECREE AFFIRMED.

347 - 18390.

MARY POWERS, Appellee, vs. CHICAGO CITY RAILWAY COMPANY, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE BAUME DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court for $1,200 in an action on the case by appellee against appellant to recover damages for personal injuries.

Appellee was injured at or near the intersection of Halsted and 63rd streets while boarding or attempting to board an east bound car operated by appellant on 63rd street.

The declaration contains two counts. The first count charges that appellant brought the car to a standstill at the intersection of Halsted and 63rd streets and that while appellee was in the act of boarding the said car and in the exercise of due care and caution for her own safety, appellant carelessly, negligently and improperly, suddenly and unexpectedly and without warning to appellee started the said car, and thereby appellee was then and there thrown to and upon the ground and injured.

The second count charges that appellee became a passenger on the car and that appellant so carelessly, negligently and improperly drove and managed the same that thereby appellee who was then and there in the exercise of due care for her own safety was thrown from and off said car to and upon the ground there, and by reason thereof was then and there greatly bruised, hurt, wounded and injured, and suffered a miscarriage, and appellee's nervous system was thereby shocked and injured.

It is first insisted that the verdict of the jury is against the manifest weight of the evidence.

The evidence bearing upon all the issues of fact involved, save upon the issue whether or not appellee was injured while boarding or attempting to board the car in question, is in irreconcilable conflict.

The main controversy in the case arises over the question whether appellee attempted to board the car while it was standing at the customary stopping place or after and while it was in motion.

Three witnesses called on behalf of appellee, including herself, testified that at the time appellee attempted to board the car it was standing still, and that before she was able to secure a firm footing upon the first step of the rear platform, the car was started forward. There are some discrepancies and contradictions in the testimony of these witnesses, but such discrepancies and contradictions relate to matters of comparatively slight consequence rather than to matters of vital and controlling influence.

It is claimed on behalf of appellant that four witnesses, of whom three are shown to have been wholly disinterested, testified positively that the car was in motion when appellee attempted to board it, and that four other witnesses, two of whom were wholly disinterested, testified to collateral facts which harmonized with and supported the positive testimony of the first four upon that issue.

A careful consideration of the testimony of the several witnesses called on behalf of appellant, does not justify the foregoing claim.

Mrs. Wallace testified that the car was standing still when she boarded it; that she was the last one then on the street waiting to board the car; that when appellee and her daughter attempted to board the car it was in motion. She

also further testified that the car was moving when she saw appellee and her daughter on the step; that she saw them going to step on the car; that it was starting slowly; that whether it was going the very minute they stepped on the car she could not say. The crucial question in issue was whether the car was in motion at the instant that appellee boarded it, and upon this question the testimony of this witness is in hopeless conflict.

The witness, Wood, testified that appellee and her daughter boarded the car when it was in motion, but he further testified that his view was obscured; that he was then engaged in conversation with a friend and wasn't paying very much attention there at the time.

The testimony of the witness, Siler, is clear to the effect that the car was in motion when appellee attempted to board it, but is in conflict with the testimony of other of appellant's witnesses in respect to several collateral matters.

Clare, the conductor of the car, testified that when he gave the bell to go ahead, after several persons had boarded the car, he looked out and the street was perfectly clear; that the next thing that occurred after that, and when the car had gone about half a car length, was a lady, appeared to be excited, come running for the car and fell. Some of the witnesses for appellant testified that when the conductor gave the signal for the car to start, and when appellee fell, he was collecting fares and Mrs. Wallace testified that he then had his back to the entrance.

Coal, the conductor of the car immediately following the car in question, testified that from a point about a block distant he saw a woman who seemed to be running as though she was running for the car.

The testimony of the other witnesses called by appellant upon that issue, merely tends to establish the conceded

fact that the car was in motion when appellee fell.

Appellee having testified that she suffered a miscarriage in consequence of her injuries, a physician, called as a witness by appellee was not improperly asked whether he had made an examination for any conditions that might result from a miscarriage. The inquiry related to a subject within the issues in the case.

The hypothetical question propounded by counsel for appellee to Dr. Cox, called as a medical expert, was predicated upon competent evidence in the case relating to the location and extent of the injuries claimed to have been sustained by appellee, and is not subject to the criticism urged by appellant.

The alleged act of appellant in starting the car while appellee was attempting to board the same was clearly covered by the averments in the second count of the declaration, and the instruction tendered by appellant directing the jury to disregard said count was properly refused. The averment with reference to the alleged negligent and improper management of the car does not relate solely to the conduct of the motorman, but to the conduct of the conductor as well.

The 10th instruction given at the instance of appellee is as follows:

> "The jury are instructed that the fact that any witness in the case is, or has been in the employ of either the plaintiff or defendant, as well as the relations which exist between any witness and either party to the suit, and any interest a witness may have in the result of the suit, so far as the same may be shown by the evidence, may be considered by the jury in determining the weight which ought to be given to the testimony of such witness, taking the same in connection with all the other evidence in the case, and the facts and circumstances proven."

The case at bar is extremely close upon the facts. If the testimony of the conductor of the car in question, an employe of appellant, is true, appellee is not entitled to recover, and, therefore, an instruction which improperly in-

forms the jury as to the rule to be applied in weighing the testimony of witnesses, who are employes of appellant, cannot be held to be merely harmless error.

In so far as the instruction quoted informs the jury that in determining the weight which ought to be given to the testimony of a witness they may consider the fact that such witness is or has been in the employ of either party, the instruction applied solely to certain witnesses who testified on behalf of appellant, and the mere fact that such witnesses were or had been in the employ of appellant is assumed to be a legitimate ground for discrediting their testimony.

Where the verdict of a jury is not inconsistent with the hypothesis that everything testified to by the class of witnesses named is absolutely true, such instruction is not harmful, but whatever our initial views might be upon the question, and whatever the previous holdings of the Supreme Court, we are impelled, upon the authority of Bennett v. C. C. Ry. Co., 243 Ill., 420, to hold that upon the record in this case, the instruction was prejudicially erroneous. See also Owens v. C. C. Ry. Co., 171 Ill. App., 647; Cicero & Proviso St. Ry. Co. v. Rollins, 195 Ill., 210, and C. & E. I. Ry. Co. v. Burridge, 211 Ill., 9.

The slight error in phraseology in the 13th instruction given at the instance of appellee will doubtless be corrected upon another trial.

For the error in giving the 10th instruction requested by appellee the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

8 - 19334.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. MIKE CRILLY, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BAUME DELIVERED THE OPINION OF THE COURT.

On December 9, 1913, an information was filed in the Municipal Court against the plaintiff in error, Mike Crilly, wherein it was charged that on the same day in the City of Chicago, plaintiff in error "did then and there with other persons, actually do an unlawful act with force and violence against the person of Charles Heller", contrary, etc. Upon a trial by jury plaintiff in error was found guilty in manner and form as charged in the information, and after motions for a new trial and in arrest of judgment were overruled, was sentenced to pay a fine of $50 and to stand committed, etc.

It is conceded that the information was drafted with the view of thereby charging the statutory offense of riot, which is defined in Section 249 of the Criminal Code, as follows:

"If two or more persons actually do an unlawful act with force and violence against the person or property of another, with or without a common cause of quarrel or even do a lawful act in a violent or tumultuous manner, the persons so offending shall be deemed guilty of a riot, and shall severally be fined not exceeding $500 or confined in the county jail not exceeding six months."

It is insisted that the information is wholly insufficient to support the conviction of plaintiff in error and that the court erred in overruling the motion in arrest of judgment.

Of the several reasons advanced in support of such insistence, but one merits serious consideration.

The charge merely in the language of the information that plaintiff in error did "actually do an unlawful act with force and violence against the person of the said Charles Roller", neither describes the act which constituted the offense sought to be charged, nor designates the act by any term or form of expression whereby the nature or character of the act complained of may be understood with reasonable certainty.

It is urged on behalf of defendant in error that the information must be held sufficient because it states the offense in the terms and language of the statute creating the offense. Sec. 6 of Div. 11 of the Criminal Code.

Section 27 of the Municipal Court Act provides that "Every information shall set forth the offense with reasonable certainty, substantially as required in an indictment*****."

Section 6 of Div. 11 of the Criminal Code is to be given a construction consistent with the requirement in section 9 of Article 2 of the Constitution, providing that in all criminal prosecutions the accused shall have the right "to demand the nature and cause of the accusation" against him.

The rule that it is generally sufficient to state a statutory offense in the terms and language of the statute is subject to well recognized exceptions, one of which exceptions is directly applicable to the information here involved.

In Cochran v. People, 175 Ill., 28, it is said:

"Where the language of the statute describes the act or acts constituting the offense, no more is necessary than to state the offense in that language, as where the offense is having in possession instruments used in counterfeiting coin. In an indictment for that offense it was held sufficient to allege that the defendant had in his possession, knowingly

and without lawful excuse, certain instruments and tools used in counterfeiting the coin current in this State, being in conformity to the definition of the crime in the Criminal Code. There the act constituting the offense was having in possession, etc., no matter by what means possession was obtained. And so in Loehr v. People, 132 Ill., 504, the indictment being for defacing and altering a book, the language of the statute being, "If any judge,*****or any person whatsoever shall*****alter, corrupt, withdraw, falsify or avoid any record,*****the person so offending shall be imprisoned in the penitentiary not less than one nor more than seven years", it was held sufficient to state the offense in the language of the statute, without specifying particularly how the alteration was made. Here, again, the offense consisted in the act of defacing or altering, no matter by what means or how it was done; and so as to the cases there cited, and many others relied upon by counsel for the People as sustaining this indictment. In another class of cases, where the act constituting the offense is committed by means of doing certain things, such as obtaining money by means of a confidence game, it has been held sufficient to charge that the accused did unlawfully and feloniously obtain "money by means and by use of the confidence game". These cases, however, are based either upon the express provision of the statute that it shall be deemed and held a sufficient description of the offense to charge that the accused did, on, etc., "unlawfully and feloniously obtain or attempt to obtain (as the case may be) from A. B. his money by means and use of the confidence game," or upon the theory that the term "confidence game" has a well understood meaning, the use of which in an indictment sufficiently apprises the accused of what he is called upon to defend. Morton v. People, 47 Ill., 468; Maxwell v. People, 158 Ill., 248."

See also Johnson v. People, 113 Ill., 99; Neat v. People, 137 Ill., 189; and People v. Clark, 256 Ill., 14.

Young v. People, 193 Ill., 236, is cited in support of the rule that a motion in arrest of judgment cannot be sustained for any matter not affecting the real merits of the offense charged in the indictment or information. Unquestionably this is the rule, but its operation does not dispense with the necessity of sufficiently charging the offense in the indictment or information. In fact, the rule does not become operative in the absence of an indictment or information sufficiently charging the offense.

The fact that the offense is insufficiently charged may not affect the question of the guilt or innocence of the accused, but it does affect the validity of his conviction. People v. Zlotnicki, 246 Ill., 185.

The information is insufficient to support the conviction of plaintiff in error and the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

9 - 19355.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. ED. CARBINE, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BAUMS DELIVERED THE OPINION OF THE COURT.

Upon an information filed in the Municipal Court charging that on December 9, 1918, at the City of Chicago, plaintiff in error, Ed. Carbine, "did then and there with other persons actually do an unlawful act with force and violence against the person of Charles Boller", said plaintiff in error in a trial by a jury was found guilty in manner and form as charged in the information, and after a motion in arrest of judgment was overruled, was sentenced to pay a fine of $50 and to stand committed, etc. This writ of error is prosecuted to review the record in said proceeding. The case has been consolidated for hearing in this court with the case of People v. Crilly, No. 19354, and the case of People v. Swappach, No. 19356, involving precisely the same questions.

For the reasons stated in the opinion this day filed in the Crilly case, the information here involved must be held insufficient to support the conviction of plaintiff in error, and the judgment of the Municipal Court is, therefore, reversed and the cause remanded.

REVERSED AND REMANDED.

10 - 19256.

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

G. H. SWAPPACH,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BAUM DELIVERED THE OPINION OF THE COURT.

Upon an information filed in the Municipal Court charging that on December 9, 1910, at the City of Chicago, plaintiff in error, G. H. Swappach, "did then and there with other persons actually do an unlawful act with force and violence against the person of Charles Roller," said plaintiff in error was, in a trial by a jury, found guilty in manner and form as charged in the information, and after a motion in arrest of judgment was overruled was sentenced to pay a fine of $50, and to stand committed, etc. This writ of error is prosecuted to review the record in said proceeding. The case has been consolidated for hearing in this court with the case of People v. Crilly, No. 19254, and the case of People v. Carbine, No. 19255, involving precisely the same questions.

For the reasons stated in the opinion this day filed in the Crilly case, the information here involved must be held insufficient to support the conviction of plaintiff in error, and the judgment of the Municipal Court is, therefore, reversed and the cause remanded.

REVERSED AND REMANDED.

201 - 19501.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	ERROR TO
vs.	MUNICIPAL COURT
SAMUEL ROTH, Plaintiff in Error.	OF CHICAGO.

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

Plaintiff in error, Samuel Roth, filed in the Municipal Court his written waiver of a trial by jury in proper form and was tried by the court upon an information duly sworn to before the clerk of said court by one John F. Rushkewicz, and was found guilty in manner and form as charged. The information acts for, in substance, that Alexander Weiss on March 19, A. D. 1913, at the City of Chicago, being then and there the manager of a restaurant, known as A. Weiss & Company, at 23 East Randolph street, Chicago, unlawfully required, permitted and suffered one Agnieszka Wystak, a female, to beemployed at work there more than ten hours during the twenty-four hours comprising the said 19th day of March, 1913. And the said Alexander Weiss being then and there the manager of said restaurant, did then and there unlawfully fail to keep an accurate time record, showing the hours of employment of females, contrary to the form of the statute, etc.

The court having overruled his motions for a new trial and in arrest of judgment, entered judgment "that said defendant, Samuel Roth, is guilty of the Criminal offense of violating an act regulating the employment of females in the State of Illinois", and was adjudged and sentenced to pay a fine of $100.00 and the costs of suit, and that he stand committed to the House of Correction of the City of Chicago until said fine and costs are paid or worked out by him at $1.50 per day, etc.

By agreement of the parties the name of Samuel Roth was to be substituted in the information in place of that of Alexander Weiss, and plaintiff in error expressly states that he raises no point as to that variance.

The female employee against whom the defendant in error sought to show that the alleged crime was committed testified that her name was Agnes Lyslac. All other witnesses in the case testified that her name was Agnes Nyslac, or referred to her as Agnes Nyslac. No witness testified that her name was either Agnieszka Nystak or Agnes Nystak. It is suggested by counsel for defendant in error without proof to support it that the name Agnieszka is the Polish name for the name, Agnes, and that the stenographic report should show that the girl testified that her name was Agnes Nyslak instead of Agnes Lyslak, and that it contains a clerical error in that particular. It makes little difference whether the employee's name was Agnes Nyslak or Agnes Lyslak as the information charges that the offense was committed against Agnieszka Nystak. Nystak and Lyslak and Lyslak are entirely different names and there was, therefore, a fatal variance between the name of the female employee described in the information and the one shown by the proof. The doctrine of idem sonans is not applicable as the difference in the sound of the names is very pronounced. It is essential, in all prosecutions, that both the Christian and the surname of the party against whom the alleged offense was committed should be proved as laid in the indictment or information. Davis v. People, 19 Ill., 73; Penrod v. People, 89 Ill., 150; People v. Smith, 358 Ill., 502; People v. Weinstein, 355 Ill., 530.

It is immaterial that the question of a variance was not raised on the trial. The information charged an offense to be committed against Agnieszka Nystak, but the proof failed to show it. People v. Smith, supra.

this record or the consequences of our judgment. Counsel for defendant in error had it within his power by amendment at the trial to have presented to us for review a good information, had he seen fit to have first gotten leave of the court so to do, as under our law an information of the character in question may be amended and re-verified. Long v. People, 135 Ill., 435; People v. Zlotnicki, 246 Ill., 185; Daxenbeckler v. People, 93 Ill. App., 553; Bergstresser v. People, 154 Ill. App., 609; People v. Manna, 148 Ill. App., 571; Bishop on Criminal Procedure, Sections 714 and 715.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

238 - 18750.

AGNES M. ROSSEU, Appellee,	)	APPEAL FROM
vs.	)	SUPERIOR COURT
ARTHUR G. GOODRIDGE, Appellant.	)	COOK COUNTY.

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

The plaintiff recovered a judgment for $750, in the Superior Court, for damages occasioned by a fall from a stairway in the rear of an apartment building owned by the defendant and occupied in part by the plaintiff under a lease from the defendant. The evidence shows without contradiction, that the building was three stories high and contained six flats; that the plaintiff occupied one of the second flats; that access to the rear entrances of the flats was obtained by means of outside wooden stairways used in common by all the tenants; that on the way down the stairs from the second flat to the first, there was a landing midway between the two floors, and at the outer edge of this landing was a wooden railing, which had become loosened; that the collecting agent of the defendant had been notified of this fact and had said that he would have it repaired; that on the day of the accident, plaintiff was at work in one of the rooms in her flat, when she saw her mother coming through a passageway between defendant's building and the one adjoining it; that she knew that the sidewalk in the passageway was broken and called out to her mother to warn her of that fact, but the mother did not hear her, whereupon plaintiff ran out the back door and down the half-flight of stairs to the landing above mentioned, and leaned over the railing for the purpose of warning her mother; as

she did so, the railing gave way and she fell to the ground sustaining serious bodily injuries.

It is urged that the declaration does not state a cause of action; that it does not charge that the defendant "retained control" of the back stairway; that there is no allegation stating that at the time of the accident, the plaintiff was exercising due care for her own safety; and that no facts are alleged showing that the defective condition of the railing was the proximate cause of the accident. It may be that a demurrer to the declaration setting up these grounds, would have been well founded. But no demurrer was filed; and after verdict, the rule is, that if a declaration contains terms sufficiently general to include, by fair and reasonable intendment, any matter necessary to be proved and without proof of which the jury could not have given the verdict, the want of an express averment of such matter is cured by the verdict. Sargent Co. v. Baublis, 215 Ill. 428; Kelleher v. Chicago City Ry. Co., 256 Ill. 464. The declaration alleges that the defendant owned the building and that plaintiff occupied a part of it as his tenant; that the back stairway was used in common by all the tenants; that the railing was loose, rotten and unsafe for use, to the knowledge of defendant; that on a certain day, "said plaintiff went on and upon said stairway, using all due care and caution for her own safety, and because of the unsafe, loose and rotten condition of said railing, it, said railing, became unfastened from said stairway and from said building, and, as a result thereof, plaintiff fell from and off of said stairway to and upon the ground" etc. Tested by the rule above stated, we think these allegations are sufficient, after verdict. While there is no specific averment in the declaration that the defendant "retained control" of the back stairway, that conclusion may be reasonably implied from the express averment that the stairway was used in

common; for if so used, it is reasonable to assume that it was not specifically demised to any tenant, but, like the roof, the outside walls, or the back yard, remained in the control of the owner of the property. Payne v. Irvin, 44 Ill. App. 105; affirmed, 144 Ill. 462. That the plaintiff exercised due care at the time of the injury, and that the defendant's neglect was the proximate cause of the injury, are reasonable inferences from the averments quoted.

It is next urged that the evidence shows that the defective condition of the railing was obvious, that the accident occurred in the day time, and that therefore the act of the plaintiff, in leaning against the railing, when by the exercise of ordinary care she might have known it would not keep her from falling, was such contributory negligence on her part as to preclude a recovery. There is no evidence that the plaintiff knew that the railing was loose, nor that it was unsafe for her to lean over it or against it. There is some evidence tending to prove that to an observer, it did not appear to be unsafe. But even if she had full and complete knowledge of the danger it cannot be said, as a matter of law, that the use she made of the landing and railing was necessarily incompatible with the exercise of due care. This is not a master and servant case, and the doctrine of assumed risk is not applicable. Devine v. Nat. Safe Deposit Co., 240 Ill. 369. It was for the jury to say from all the evidence whether the plaintiff exercised such care as a reasonably prudent person would have exercised under like circumstances; and, after an examination of the evidence, we cannot say that the verdict is manifestly contrary to the weight of the evidence upon that question.

It is further urged that the plaintiff was using the railing for a purpose for which it was not intended, and that the defendant was not bound to keep the railing in such repair

as to permit the plaintiff to lean against it. The railing was intended to serve as a protection to those who were lawfully using the stairway and landing. The plaintiff was lawfully upon the landing and in leaning over the railing for the purpose of warning her mother, she used it for the very purpose for which it was built, namely, as a guard or protection. There is no merit in the contention.

One of the instructions given is criticised upon the same grounds, substantially, that are urged against the declaration. The instruction in question did not direct a verdict. The defendant admitted that he owned the building. There was no evidence that the back stairs were leased to any one. Hence the instruction was not misleading, under the facts shown, even if it could be held to assume, as a fact, that the defendant retained control of the stairs.

Finding no reversible error among those assigned and discussed by appellant's counsel, the judgment of the Superior Court will be affirmed.

AFFIRMED.

334 - 18801.

ANN BURRALL GOODYKOONTZ, Administratrix of the Estate of Charles H. Goodykoontz, Deceased, Defendant in Error,	)	ERROR TO
vs.	)	CIRCUIT COURT
THOMAS F. KELLY and JOHN W. EAGLESTON, Plaintiffs in Error.	)	COOK COUNTY.

STATEMENT. By this writ of error it is sought to reverse an order of the Circuit Court of Cook County denying a motion to vacate a judgment entered by default. The record shows that service was had upon the defendants (plaintiffs in error) in November, 1911, upon a summons which was returnable to the January, 1912, term of the Circuit Court. The declaration was filed February 6, 1912, which was thirteen days prior to the first day of the February term. On February 23, 1912, the default of the defendants was taken and entered of record, and on March 13, 1912 (three days before the end of the February term), the plaintiff's damages were assessed by the court at $1250 and judgment entered for that amount. On Saturday, March 16, 1912, the last day of the February term, the defendants, by their attorney, filed a written motion to set aside and vacate the default and judgment, and on their motion, without notice to the plaintiff, the motion to vacate was continued until the next term. No affidavits in support of the motion to vacate were filed at that time; but several affidavits were filed and copies thereof served on plaintiff's attorneys two days before the motion was afterwards heard as hereinafter stated.

On March 22, 1912, at the March term of the Circuit Court, the plaintiff filed a motion to strike from the files the defendants' motion to vacate the judgment, and with it filed an affidavit of the plaintiff's attorney stating that the

defendant's motion to vacate was based upon matters of fact not appearing in the record, that no affidavits were filed with that motion, and that no notice was served upon plaintiff's attorney of the intention of defendants to make or file such a motion. Attached to this affidavit was a copy of Rules 14, 15 and 16 of the Circuit Court, relating to motions and notice of motions. Rule 14 provides as follows: "All motions not of course shall be made in writing, and when founded on matters of fact not otherwise appearing by the pleadings, or other proceedings in the cause, such facts must be presented by affidavit, which shall be filed with the motion with the minute clerk of the judge before whom the motion is to be made, and a copy thereof served with the notice of the motion". Rule 15 provides that "no motion will be heard or order made in any cause without notice to the opposite party", except where such party is in default. Rule 16 requires a written notice to be served upon the opposite party by delivering a copy to him or his attorney, before 4 P.M. of the business day next preceding the day mentioned in the notice, "but all notices served on Saturday shall be served before 12 o'clock noon of that day".

On March 30, 1912, both the motion to vacate and the motion to strike came on for hearing. The bill of exceptions shows that upon such hearing, the plaintiff offered in evidence the rules of the Circuit Court above mentioned, the affidavit of the plaintiff's attorney, an affidavit of the plaintiff to the effect that no notice had been served upon him prior to March 18th, and copies of the Chicago Daily Law Bulletin of February 24, 1912 and March 14, 1912, which reported the entry of the order of default and the entry of the judgment by default. The bill of exceptions states that this evidence was offered "upon the hearing of the plaintiff's motion"; that this "was all the evidence introduced or offered

upon the hearing of said last aforesaid motion by either party"; and that "upon plaintiff's motion" the court then entered an order which states that defendant's motion to strike out the motion of March 13, 1912 "is hereby allowed, to which ruling the plaintiff then and there duly excepts". The bill of exceptions then states "that the defendants then and there presented to the court" the affidavits of the defendants above mentioned and of their attorney, together with the amended bill of complaint, demurrer and decree in a prior suit between the same parties in the Superior Court of Cook County, (in which that court had adjudged and decreed that a certain written contract between the parties, - which contract the defendants, by their affidavits, stated was the only contract they ever had with the plaintiff, - be set aside, declared to be null and void, and deliwered up to be cancelled); but that "the court declined to read or hear read" the affidavits and records thus presented.

On April 4, 1912, both the plaintiff and the defendants made motions to set aside the order of March 30, 1912, and both motions were set for argument for April 8, 1912. On April 5, 1912, the defendants filed another written motion to vacate the default and judgment, and filed with it the affidavits and records above mentioned as having been presented to the court on March 30, 1912, together with affidavits showing that copies of the same had been served on plaintiff's attorneys on April 4, 1912. On April 8, 1912, all these motions were continued to April 13, 1912, at which time the death of the plaintiff was suggested, and the pending motions were continued generally. On May 31, 1912, the administratrix of the deceased plaintiff was made a party plaintiff. On June 15, 1912, the several motions came on for hearing before the court. At that time, the plaintiff withdrew his motion to correct the order of March 30, 1912, and an order was then entered denying both the motions of the defendants.

The bill of exceptions states that at this time "the court declined to read or hear read the affidavits theretofore filed by the defendants in support of their motion to vacate such default or judgment, or to hear any argument on said motion". Plaintiffs in error question the correctness of this ruling.

In November, 1912, the order of March 30, 1912, was corrected by transposing the words "plaintiff" and "defendants", such correction being based upon an examination of the record itself and the minutes of the clerk made at the time, and as corrected, the order was re-entered nunc pro tunc as of March 30, 1912. Defendant in error has assigned cross error upon this action of the court.

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

Preliminary motions to strike the bill of exceptions from the record, or to expunge therefrom that part relating to proceedings had in the Circuit Court at the March, 1912, and May, 1912, terms of that court were heretofore interposed and the decision upon those motions was reserved to the final hearing. The arguments advanced in support of these motions are of an extremely technical nature.

It is first insisted that the order of March 30, 1912, shows that the defendants' motion of March 18, 1912, to vacate the judgment, was "stricken out" on the defendants' own motion and that the plaintiff excepted. If the words used are to be taken in their litoral sense, this is true. But the fact that the words "plaintiff" and "defendants" were transposed, by a purely clerical error, is so clearly apparent from an examination of the whole record that it would be the manifest duty of this court, even if no correction had been made, to give the order of March 30, 1912, the meaning which was evidently intended, instead of

one so palpably absurd. The record shows, however, that the order was afterwards corrected in this respect, and we entertain not the slightest doubt of the power of the court to so correct it under the circumstances.

It is next urged that an exception cannot be shown merely by a recital in an order, without a bill of exceptions. But that rule has no application here, for the reason that the bill of exceptions expressly states that an order was entered in which the defendants' exception was noted. This amounts to the same thing as a statement by the trial judge that such an exception was then and there taken. The People v. Wabash R.R. Co., 248 Ill. 540. It is said that in this respect the language of the order of June 15, 1912, is uncertain and ambiguous. The court certifies that on that day, an order was entered denying the motion of defendants to set aside the order of March 30th, and the motion of defendants to vacate the judgment; and that defendants excepted to both of said orders. We fail to see any such ambiguity in this order as is claimed by plaintiff's counsel. When subjected to the analytical scrutiny of ingenious counsel, the form of the order may be open to criticism. But there does not seem to be any serious doubt as to what the order really means.

It is further objected that while the bill of exceptions states that on June 15, 1912, the trial court declined to read or hear read the affidavits filed by the defendants in support of their motion to vacate the default or judgment, or to hear any arguments on said motions, yet it does not contain the common recital that this "was all the evidence heard or offered" on the hearing of said motion; and we are asked to indulge the presumption that other evidence or affidavits may have beenpresented to or heard by the court which would render unnecessary any reading or consideration of defendants' affidavits. The bill of

exceptions does not show that the court declined to consider the defendants' affidavits upon the ground that the matters therein contained were incompetent, irrelevant or immaterial. The bill states that the court declined to read them or hear them read, "or to hear any argument" upon the defendants' motions. No other conclusion can be drawn from this statement than that the court declined to hear any affidavits in support of the motion to vacate, no matter what facts were set up by the affidavits. Such a ruling could only have been made upon the theory that the court believed it had lost jurisdiction to hear or consider the motion. The question presented by this writ of error, therefore, is not whether other evidence, if offered, might have justified the court in refusing to grant the motion to vacate, but whether the court was justified in refusing to hear any evidence upon the motion which was filed on April 5, 1912. Upon this question, the failure of the bill to recite all the evidence offered is immaterial.

For the reasons indicated the motions to strike the bill of exceptions from the record or to expunge the parts above mentioned are denied.

We are of the opinion that when the order of March 16, 1912, continuing the defendants' motion to vacate the judgment to the next term of the court was entered, the court thereby retained jurisdiction to act upon that motion, or any similar motion, at any time during the succeeding term. The validity and effect of the order of continuance do not depend upon the form in which the motion of March 16 was presented. Hence, if it be conceded that the court, on March 30, 1912, properly struck the defendants' motion from the files because it was not, when made, accompanied by affidavits, as required by the rules, nevertheless, the court having retained jurisdiction of the cause by the entry of the order of continuance, had the power at any time during the

March term to entertain another motion to vacate the judgment; and such a motion having been filed during the March term, accompanied by affidavits, the court then not only had the power, but it was its duty, to hear and determine the second motion. It appears that the second motion was regularly and properly made in accordance with the rules, and was continued until the May term. The affidavits and documents which were presented to the court with the motion purport to show, upon their face, that the defendants had a meritorious defense and that the defendants' attorney acted with reasonable promptness in making his motion to set aside the judgment. Defendants had the right to a hearing and a decision upon the second motion thus made, entirely apart from, and irrespective of, the fact that the first motion had been "stricken out"; and therefore the court erred in "declining to read or hear read" the affidavits submitted. The order of the Circuit Court entered June 15, 1912, is reversed and the cause is remanded to that court for further proceedings not inconsistent with the viewsherein expressed.

REVERSED AND REMANDED.

October Term, 1912.

355 - 18822.

JOSEPH GOODMAN, Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT
ALEXANDER WEINBERGER, Appellant.	)	COOK COUNTY.

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment for $295 in an action of trespass and the defendant appeals. One count of the declaration alleges that in December, 1908, the defendant, with force and arms, entered a barn and two sheds of the plaintiff "and made a great noise therein", and without leave or license and against the will of the plaintiff, "kept divers tenants, goods, implements, horses and wagons" therein, to the injury of the plaintiff. The other counts of the declaration allege that in July, 1910, the defendant, with force and arms, broke and entered into the barn and sheds of the plaintiff and ejected the plaintiff therefrom. The evidence shows that on December 4, 1908, defendant leased to the plaintiff the first floor of 2420 Kensington Ave., "including also barn and two sheds located on adjoining lot east"; that there was a barn in the rear of number 2420 Kensington Avenue but none on the adjoining lot east; that there were two sheds on the adjoining lot to the east in which plaintiff stored some of his goods; and that in July, 1910, defendant tore down these sheds for the purpose of constructing a new building on that lot. The defendant claimed that before he tore down the sheds, he had an understanding with the plaintiff to allow him the use of other property in lieu of the sheds, and that plaintiff in fact used such other property. The plaintiff

denied there was any such understanding.

It is urged that the verdict is contrary to the evidence, because the evidence of the defendant and his two sons is of more weight than the evidence of the plaintiff. The mere fact that more witnesses testified on one side than on the other does not, of itself, determine the weight of evidence. The jury saw and heard the witnesses and the verdict has been sustained by the trial court. We are unable to find any facts or circumstances which would justify us in finding that both the jury and the trial court were wrong.

It is also urged that the court erred in admitting certain photographs. They were admitted, apparently, for the sole purpose of proving the location of the barn, in view of defendant's claim that the barn referred to in the lease was on the adjoining lot, and we think that the preliminary proof was sufficient for that purpose.

It is urged that the damages are excessive. The jury evidently believed the plaintiff and his witnesses, and in that view the damages awarded are not too large.

The judgment will be affirmed.

AFFIRMED.

Cocker Term, 1917

366 - 18633.

FRANK ORZOLEK,
Appellee,

vs.

S. C. SCHENCK, Agent,
and S. C. SCHENCK,
Appellant.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

MR. PRESIDING JUSTICE FITCH
DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment for $2000 rendered in the Superior Court after a jury trial in an action for personal injuries. The theory of the declaration is that the plaintiff, Orzolek, was injured while in the employ of the defendant, Schenck, through the negligence of the defendant in the management and operation of certain coal cars in a coal yard owned and controlled by the defendant. The defendant filed a plea of not guilty and two special pleas, denying that he owned, operated, or was in possession of the coal yard or cars in question at the time of the accident, and denying that the plaintiff was in the defendant's employ at that time. As we have reached the conclusion that the judgment must be reversed and the cause remanded for a new trial, for the reason that the verdict is clearly contrary to the preponderance of the evidence as to the issues raised by the special pleas, we refrain from discussing the evidence upon the issue of negligence.

Under the rule announced in Chicago Union Traction Co. v. Jerka, 227 Ill. 95, and the cases therein cited, the burden was upon the plaintiff, after the filing of the special pleas, to show that the defendant owned or operated the coal yard, or was in possession or control thereof at the time of the accident, and to show that the relation of master and servant then existed

between the plaintiff and the defendant. So far as the record shows, the plaintiff did not attempt to make any such showing, further than to show that plaintiff was working in a coal yard called (by several of the plaintiff's witnesses) "Schenck's coal yard". Perhaps this evidence, if it stood alone and uncontradicted, might have justified the inference that the plaintiff was employed by the defendant and that the defendant owned or operated, or was in control of the coal yard in question. But after the defendant's motion, made at the close of the plaintiff's evidence, to instruct the jury to find the defendant not guilty, had been denied, the defendant introduced evidence which is uncontradicted, to the effect that there were three signs upon the coal yard in question, each labeled "Delaware, Lackawanna & Western Coal Company, S. C. Schenck, Agent"; that the coal yard is at Division street and the Chicago River; that on the Division street side, and on the River side, the letters in the signs were several feet in height, and the sign upon the office was 25 feet long, with letters eighteen inches high; that the payrolls for the yard in question were upon printed forms, at the top of which is printed the name of the Coal Company; that at the top of the last column are printed the words "Received of the Delaware, Lackawanna & Western Coal Company the sums set opposite our respective names in full for services as specified of all demands to the close of above month", under which appear the signatures of the workmen, including that of the plaintiff, and at the bottom of the page appears the words: "Correct, S. C. Schenck, Sales Agent"; and that the defendant is a sales agent of the Coal Company and the general manager for the Coal Company of the coal yard in question. The motion to find the defendant not guilty was renewed at the close of all the evidence; but while the record shows that the instruction was marked "refused",

it does not show that any exception was taken at that time by the defendant. In this condition of the record, the defendant is not in a position to raise the question whether the instruction should have been given upon the theory that there was no evidence tending to sustain the allegations of the declaration as to the issues made by the special pleas. A motion for a new trial, however, was made and overruled and an exception duly preserved. Upon that motion, the question was not whether there was a total lack of evidence tending to prove the issues raised by the special pleas, but whether the verdict was contrary to the evidence upon those issues; and upon that question, if the verdict was clearly and manifestly contrary to the weight of the evidence, it was error for the court to deny the motion for a new trial. Donelson v. E. St. L. Ry. Co., 235 Ill. 625. The evidence being as above stated, we are of the opinion that the verdict was clearly and manifestly contrary to the weight of the evidence bearing upon the issues raised by the special pleas, and that it was error, for that reason, to deny the motion for a new trial.

This conclusion renders unnecessary any discussion of other errors assigned, with one exception. The exception is the alleged error in denying a petition filed by the defendant for removal of the cause to the United States Circuit Court. The summons, which was served on September 5, 1911, required the defendant to appear and answer on the first Monday of October, 1911. The first Monday of October, 1911, was October 2, 1911. The petition for removal was filed on October 18, 1911. The act of Congress governing such petitions, in force at that time, provides that the party desiring to remove the cause shall file a petition in the State court "at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or

plead to the declaration or complaint of the plaintiff" (Hurd's Stat. 1909, p. 83). If there is any rule of the Superior Court fixing the time within which a defendant must plead to a declaration, it is not shown in the record. The "laws of the State" upon that question are contained in the Practice Act. Section 1 of that Act requires a summons to be issued and to be "made returnable on the first day of the next term of the court in which the action may be commenced"; but that "if ten days shall not intervene between the time of issuing out the summons and the next term of court, it shall be made returnable to the succeeding term". Section 3 provides that if the summons be "not served ten days before the return day thereof, the defendant shall be entitled to a continuance, and shall not be compelled to plead before the next succeeding term". Section 32 provides that if the plaintiff shall not file his declaration "ten days before the court at which the summons or capias is made returnable" then the court on motion of the defendant shall continue the cause. Section 57 provides that "for want of appearance, the court may give judgment by default, except in cases where the process has not been served, or declaration filed, ten days before the term of the court." While the Practice Act does not, in express terms, provide that in the absence of any rule of court, the defendant must appear and plead on the return day of the writ of summons, i.e., the first day of the term, if service was had and the declaration filed at least ten days before that day, such is the clear intent and meaning of the statute. In this case, though the declaration was filed nearly a year before the beginning of the October, 1911 Term of the Superior Court, and the summons was served nearly a month before that term, the petition for removal was not filed until the 17th day of the term. Under the decision in South Park Commissioners v. Ayer, 237 Ill. 211, this was not in apt time, and it was

not error for the court to deny the petition. The constitutional question suggested in the reply brief of appellant's counsel cannot be raised in this court. Houren v. C.M. & St. P. Ry. Co., 236 Ill. 620.

For the error indicated, the judgment of the Superior Court will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

322 - 18787.

ROBERT SMITH, Plaintiff in Error,	)	ERROR TO
vs.	)	CIRCUIT COURT
CHICAGO RAILWAYS COMPANY, Defendant in Error.	)	COOK COUNTY.

MR. JUSTICE BRIDLEY DELIVERED THE OPINION OF THE COURT.

On the trial of an action against the Chicago Railways Company for damages for personal injuries sustained by Robert Smith, plaintiff below, the jury returned a verdict, April 5, 1912, finding the defendant not guilty, and the court entered judgment upon the verdict against the plaintiff for costs. This writ of error is prosecuted to reverse the judgment.

The accident happened about seven o'clock in the evening, February 3, 1911, in West Randolph street at or near the intersection of Canal street in the city of Chicago. These streets cross at right angles, West Randolph street being an east and west street and Canal street a north and south street. At the time of the accident the defendant operated a double track street railway on West Randolph street, east-bound cars running on the south track and west-bound cars running on the north track.

Plaintiff's declaration, filed April 24, 1911, consisted of two counts. The first count charged in substance that, while the plaintiff, as a pedestrian, was rightfully upon a public street known as Randolph street at or near the intersection of Canal street, and was exercising ordinary care and caution for his own safety, the defendant negligently "ran, moved, managed, handled, conducted, propelled, controlled, maintained, equipped and operated one of its cars in an <u>easterly</u> direction" along said

Randolph street so that the car struck plaintiff, thereby greatly injuring him, etc. The second count charged that the defendant "wilfully, wantonly and without due regard for human life" ran, moved, etc., said car in "an easterly direction", whereby, etc. During the progress of the trial plaintiff amended both counts changing the words "easterly direction" to "westerly direction".

The testimony of plaintiff's witnesses as to the details of the accident was conflicting. According to plaintiff's version he walked north on the east side of Canal street and reached Randolph street; that before he stepped off the sidewalk to cross Randolph street he looked in each direction for approaching cars, saw one coming from the west but saw nothing at all coming from the east; that he stepped into the street and waited for the car coming from the west to pass him; that as soon as it passed he crossed the south track and just as he put his left foot out and started to cross the north track a west-bound car struck his left ankle and he fell between the two tracks; and that as a result of the injury his leg subsequently had to be amputated. Two witnesses for plaintiff, standing on the north sidewalk of Randolph street, testified that they saw plaintiff start to cross the street; that when the cars passed he was lying north of both tracks, where they picked him up; that the street was well lighted; that there were no other wagons or vehicles in the street at the time except the two cars; and that they called an ambulance and he was taken to the hospital. Several witnesses testified that shortly after the accident plaintiff stated that he was struck by an "east-bound" car. According to the testimony offered by defendant there was a slight down grade in Randolph street toward the west from the viaduct just west of the Chicago river, and that the distance from the point where a west-bound car "starts to descend" towards

the west to the east line of Canal street is 352 feet, and that a car approaching from the east can be seen that entire distance from Canal street.

Whether or not, under all the facts and circumstances in evidence, the defendant was guilty of negligence, or the plaintiff guilty of contributory negligence, or the defendant guilty of wanton negligence, were questions of fact for the jury, and we cannot say that the verdict is against the weight of the evidence.

Complaint is made of the giving of certain instructions offered by the defendant. We deem it unnecessary to here discuss those instructions. Suffice it to say that after considering them we do not think that under the evidence the court committed error, prejudicial to the plaintiff, in giving them. Nor do we think that the trial court erred in admitting certain evidence on behalf of defendant, as contended by counsel for plaintiff.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

October Term, 1918.
18,[illegible]
228 - 16880.

MAX G. J. HOFFMAN, doing business as THE AAMAX-HOFFMAN CABINET WORKS, Defendant in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT
ZULU MANUFACTURING COMPANY, a corporation, Plaintiff in Error.	)	OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This writ of error is sued out by the plaintiff in error, the Zulu Manufacturing Company (hereinafter designated as the defendant), to reverse a judgment of the Municipal Court of Chicago for $382.88 in a fourth class case, entered in favor of Max G. J. Hoffman, doing business as The Aamax-Hoffman Cabinet Works, defendant in error (hereinafter designated as the plaintiff). On a previous trial of this case by the court without a jury, the plaintiff obtained a finding and judgment in his favor. For some reason, not appearing in the record, the judgment was vacated and a new trial granted by the trial court.

There are no disputed questions of law in this case. The defendant insists that the finding of the trial court is against the weight of the evidence in the case.

The defendant was engaged in the business of selling chewing gum vending machines and match vending machines, and in the fall of 1910, being in the market for cabinets to be used in the construction of match vending machines, sent for the plaintiff, who was engaged in the manufacture of cabinet work, and discussed with him a proposition for the making of the cabinet work for match vending machines. As a result of the conference, the plaintiff entered into a contract with the defendant to make the cabinet work for one thousand match vending machines. The cabinet work was to form the sides and back of

the machine. Iron casting work was to form the front or face of the machine. The defendant company procured the iron castings from a third party, and the plan of the defendant contemplated that the cabinet work and the iron casting work should fit together. Prior to the making of the contract the defendant furnished the plaintiff with a sample iron casting, and the plaintiff then made a sample cabinet for the defendant. This sample cabinet apparently fitted the sample casting that had been furnished to the plaintiff by the defendant. In any event, the sample cabinet was satisfactory to the defendant, and the contract followed. It is not necessary to give all the details of the contract. After the plaintiff had made and delivered over one-half of the number of the cabinets called for by the contract, the defendant complained to the plaintiffs that the cabinets delivered did not comply with the terms of the contract. The plaintiff apparently agreed that there was something wrong with the cabinets, and he took all but twenty-five back to his factory. The defendant claims that the twenty-five cabinets that were not taken back were also defective, but does not give any reason why the twenty-five cabinets were retained by the defendant. The plaintiff says that no complaints were made by the defendant as to the twenty-five cabinets. The plaintiff introduced evidence to the effect that after the cabinets were taken back to the factory of the plaintiff, certain changes were made in them, and that the cabinets, after the changes had been made, complied with the requirements of the contract. Seventy-two of these cabinets were then sent to the defendant. The plaintiff testified that he was commencing to doubt the good faith of the defendant company, and that he went to the president of the defendant company and asked him for payment for the cabinets that had been delivered, and that the president stated to him that the defendant would not receive any more cabinets from the plaintiff, nor

would it pay him a cent for any cabinets. The plaintiff further testified that at the time of this interview he had finished five hundred cabinets and that all of these complied with the terms of the contract, and that at the same time the work on the balance of the cabinets had been almost finished. The president of the defendant company denied that he made the aforesaid statements to the plaintiff, and evidence was introduced by the defendant to the effect that the plaintiff had never tendered to the defendant any cabinets that substantially complied with the terms of the contract, and that the defendant had been ready and willing at all times to carry out the contract with the plaintiff. There was evidence in the case to the effect that the iron castings were not of a uniform size, and that as the cabinets per contract were made to a uniform size, the defendant found it impossible to make all the cabinets and iron castings fit together.

The trial court saw and heard the witnesses in the case. He had before him a large number of the cabinets and the iron castings, and he found the issues for the plaintiff. We cannot say, after a careful examination of all the evidence in the case and after considering all the various points raised by the defendant in reference to the evidence, that the finding of the trial court is manifestly against the weight of the evidence. The trial court in his decision, found that the defendant had trouble in making the cabinets and the iron casting work fit and that the trouble was due entirely to the fact that the castings varied in measurements, while the cabinets, per contract, were made to a uniform size. We think this conclusion of the trial court is amply warranted by the evidence.

This case has been twice tried by a court without a jury, and each time there has been a finding and judgment for

the plaintiff. We see no reason to disturb the judgment of the Municipal Court, and it will therefore be affirmed.

AFFIRMED.

October Term, 1912.

280 - 18727.

MARY BOTTIGLIERO, Defendant in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT
SAMUEL POLAKOW, Plaintiff in Error.	)	OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is a writ of error sued out to reverse a judgment of the Municipal Court of Chicago, in the sum of $377.88, in a fourth class case, in which the plaintiff in error (hereinafter referred to as the defendant) was the defendant and the defendant in error (hereinafter referred to as the plaintiff) was the plaintiff. The case was tried by the court without a jury.

The defendant, on or about April 9, 1910, conveyed, by a statutory warranty deed, to the plaintiff a certain piece of real estate in the City of Chicago, subject to certain incumbrances described in said deed, which are not in question in this suit, it being admitted that the mechanic's lien, out of which the present suit grew, was not included in the incumbrances mentioned in the deed.

At the time of the delivery of the said deed a claim for lien had been filed in the office of the clerk of the Circuit Court, by the Illinois Portland Cement Paving Company, for $199.50. From an examination of the title to the said real estate, the plaintiff had learned of the filing of the said lien, and in order to satisfy the plaintiff and to consummate the sale of said real estate, defendant simultaneously, with the delivery of the warranty deed, executed and delivered an agreement of indemnity to plaintiff.

On June 3, 1910, the Cement Paving Company filed a bill in the Circuit Court of Cook County to enforce its lien; the plaintiff and others were made parties to the same, and a summons was issued and served on the plaintiff.

On March 1, 1911, the master in chancery to whom the case had been referred, made a report in favor of the Cement Paving Company, and on March17, 1911, a decree of sale of the premises described in said warranty deed was entered, and on April 22, 1911, the said real estate was sold for $330.37 by the master to satisfy said decree. The defendant did not defend the lien case nor did he take any steps to protect the plaintiff in the premises.

The plaintiff was obliged to, and did redeem from said sale, and she expended in doing so the sum of $330.37. She also incurred the sum of twenty-five ($25.00) dollars, attorney's fees in and about the redemption from the said sale, and 80 cents for recording the redemption certificate. The present suit was commenced by the plaintiff to recover from the defendant the amount of the aforesaid items, together with the interest on the amount paid by the plaintiff to redeem from the sale, from the date of the sale until the date of the judgment in this case.

Only one error is assigned by the defendant, and this relates to a controverted question of fact in the case. Defendant insists that the court should not have allowed the plaintiff the $25.00 for attorney's fees and the eighty cents for recording the certificate of redemption, because, defendant contends, the plaintiff did not give the defendant any notice of the filing of the mechanic's lien suit; that in the absence of such notice, the defendant is not liable to the plaintiff for the attorney's fees and the cost of filing the redemption certificate.

Whether the plaintiff gave notice to the defendant of the filing of the lien suit or not was a controverted question of fact in the case. The trial court heard the evidence and saw the witnesses who testified on the subject, and we are satisfied, after a careful reading of the record, that we cannot say that the finding of the trial court, on the question of notice, is manifestly against the weight of the evidence in the case.

There is no merit in this writ of error, and the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

October Term, 1922

375 - 18842

JULIA OBERMEYER, Appellee,	)	
	)	APPEAL FROM SUPERIOR
vs.	)	COURT, COOK COUNTY.
CHICAGO CITY RAILWAY COMPANY, Appellant.	)	

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment of $7000 recovered by appellee, Julia Obermeyer, against appellant, in an action to recover damages for personal injuries alleged to have been sustained by appellee while a passenger on a street car of appellant. The car in which she was riding collided with another car of appellant standing on a switch and projecting into the course of the car on which appellee was riding. On the trial appellant announced that it would not dispute its liability. The controversy is upon the question of the existence and extent of appellee's injuries caused by the accident. The parties are hereinafter referred to as they stood in the court below.

The declaration contained one count and alleged that plaintiff was a passenger on one of defendant's cars, and while she was exercising ordinary care for her safety, the car in which she was riding collided with another car of defendant, by reason whereof the plaintiff was thrown with great force and violence against the side, floor and seats of the car in which she was riding and severely and permanently injured. The allegations as to the injuries were in the usual form and made no charge that the injury aggravated or aroused any prior existing disease or impaired condition. The defendant pleaded not guilty.

The accident occurred on July 29, 1909. The car in which plaintiff was riding was a southbound Wentworth avenue car. Between 77th and 78th streets, at a point opposite a car barn of defendant, this car ran into another street car which was standing on a switch track or being moved out of the barn over the switch track toward the main track.

The main injury complained of on the trial, and to which the evidence was mainly directed, was an injury to plaintiff's left knee which caused great pain. The evidence disclosed no objective symptoms, not even a bruise or abrasion of the skin. The evidence leaves great doubt as to whether the plaintiff's knee was injured by the accident complained of. It tends strongly to show that the pain in her knee complained of after the accident and continually up to the time of the trial was the result of rheumatism for which plaintiff had been treated. The plaintiff's claim, that her health was perfect before the accident, was seriously controverted by the testimony of physicians who had attended her at various times for years prior to the accident as well as by the testimony of neighbors who knew her and saw her during that period. The whole case is involved in so much doubt and uncertainty by the testimony that the rulings on the admission of evidence and on the instructions, if erroneous as we think they were, must cause a reversal of the judgment.

Dr. Hertel was the plaintiff's family physician and was called upon to attend the plaintiff at her home and in the hospital to which she was taken immediately after the accident. Dr. Hertel was produced as a witness on behalf of the plaintiff and examined. His testimony was apparently unsatisfactory to counsel for the plaintiff. On re-direct examination of Dr. Hertel, plaintiff's counsel undertook to lay the foundation for an impeachment of his own witness. He was examined by the plaintiff's counsel as follows:

"Q. Doctor, didn't you tell me last night in the presence of this woman's husband, in her presence, and her daughter's presence, that it was your opinion that the ligaments in there attached to the inner condyle were ruptured?

(Objected to by defendant on the ground that the question was not impeachment of anything the doctor had said, that it was immaterial, that it was incompetent, and that he could not testify here that he did form such an opinion unless he based it upon some findings, and that counsel could not impeach his own witness. Objection overruled, to which ruling defendant duly excepted.)

Mr. Waters: Now the question is, didn't you last night when you were at Mr. Obermeyer's house in the presence of Mr. Obermeyer, Mrs. Obermeyer and Katherine Obermeyer tell me that when you were treating this woman and when you diagnosed the case that the injury consisted of a rupture of the ligaments attached to the inner condyle in the knee?

(Question objected to on same grounds presented as objections to last question.)

The court: Doctor, have you an opinion now as to whether or not the ligament in that knee was injured?

A. I have not.

The Court: Now he may answer the question that counsel has put.

A. I didn't word my statement in those words.

Q. The question is, did you tell me that, yes or no?

A. No."

Later, when the plaintiff was being examined, plaintiff's counsel asked plaintiff whether Dr. Hertel had stated on the night before that he had diagnosed plaintiff's case at the hospital as a rupture of the ligaments attached to the inner condyle of the knee. Defendant objected on the ground that the question was not the question asked Dr. Hertel and that plaintiff could not impeach her own witness. The court overruled the objection, and the plaintiff answered in the affirmative.

Katherine Obermeyer was recalled on behalf of plaintiff and permitted, over objection, to testify that Dr. Hertel made the statement.

The testimony of Dr. Hertel was material and important. In our opinion, the admission of the impeaching testimony as to the statement made by him was reversible error. 10 Ency. of Pl. & Pr., p. 318; Chicago City Ry. Co. v. Gregory, 221 Ill. 591; Hickory v. United States, 151 U. S. 303.

There is some doubt as to certain instructions given, but the questions may not arise on another trial.

For the error indicated, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

436 - 18987

FRANK KUCHLER, Appellee,

vs.

EZRA H. STAFFORD, Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

This action was brought by the plaintiff below, appellee here, against the defendant, appellant, for recovery for personal injuries received in collision with an automobile owned by the defendant and driven by his son, on March 19, 1911.

The declaration contains two counts. The first count charges the defendant, by his minor son as his agent and servant, with driving and propelling an automobile carelessly and negligently against the plaintiff, by which the plaintiff's right arm was broken. The second count charges that the defendant was the owner of the automobile, and by his agent and servant, carelessly and negligently drove and propelled the same against the plaintiff.

The defendant pleaded the general issue. A trial resulted in a verdict in favor of the plaintiff for $1250. A motion by the defendant for a new trial was overruled and judgment entered on the verdict.

The uncontroverted facts shown by the record are that the defendant, Stafford, lived at the northwest corner of Sheridan Road and Lake avenue, Wilmette. His automobile was kept in a garage on the rear end of his lot facing on the alley and about 50 feet north of Lake avenue. On March 19, 1911, his son, Russell

Stafford, about 18 years of age, took the machine from the garage and went with the family, consisting of the defendant, his wife, his mother and Webster Stafford, his son, who was about three years younger than Russell, for a drive. About four o'clock in the afternoon, they returned home and drove from the south to the front of the house on Sheridan Road where all the family except the two sons, left the machine and went into the house. After the appellant had gone into the house, Webster Stafford, the younger son, asked his brother, Russell, to allow him to take the machine around to the garage, and Russell consented. Thereupon Webster Stafford took the wheel, and with his brother in the seat beside him, drove around the block, north on Sheridan Road, west on Forest avenue, south on Fifth street, and then east on Lake avenue, toward the alley leading to defendant's garage.

As they were going east on Lake avenue toward the alley, the plaintiff, Kuchler, started from the south side of Lake avenue in a northwesterly direction toward the end of the sidewalk leading west from the alley and proceeded in substantially that direction until the machine turned into the alley. As he walked across the street, plaintiff was watching the car approaching from the west, and as he entered the approach to the alley he observed that the machine was going to turn into the alley. When the machine commenced turning, he testifies he was right at the east curb of the alley, and when he saw the machine commencing to turn into the alley, he edged off to the right across the east curb and toward the south fence of the plaintiff's lot, east of the alley.. The machine struck him about two and one half feet from the alley curb line, and pinned him against the fence, causing the injuries complained of.

It is urged that the verdict and judgment are contrary

ry to the evidence and not supported thereby, and that the accident was caused by plaintiff's own negligence. Upon a review of the evidence, we do not think that this contention is supported thereby. The plaintiff, in our opinion, was not guilty of contributory negligence. The evidence shows that when he saw that the machine was turning into the alley, he changed his course to the northeast and gave the machine the whole width of the alley. While it may be true, as contended by the defendant, that if plaintiff had stepped the other way, or even if he had maintained his northwesterly course, he would not have been struck by the machine; but when a person is confronted with sudden danger from a rapidly moving machine, it cannot be said that if, in an effort to get out of the way of the machine, he acts contrary to what was expected of him by the driver of the machine, he is guilty of contributory negligence. The plaintiff in this case sought a place of safety where he had a right to suppose that the machine would not strike him,- outside of and east of the alley and to the right of a post standing at the corner of the alley and the street. In our opinion, he was not guilty of contributory negligence, even though he may have reached a point west of the center of the alley, as contended by defendant, and then turned to the right in order to avoid the machine. Furthermore, at the request of defendant, the court submitted a special interrogatory to the jury as follows:

> "Did the plaintiff, immediately before the injury, do any negligent act which contributed to the injury?"

This interrogatory the jury answered, "No." This finding is conclusive on that point, for it was not attacked or questioned in the written motion for a new trial, nor is it attacked in the assignment of errors. Farrell v. Illinois Tunnel Co., 177 Ill. App. 425, and cases there cited.

The evidence shows that the machine was running at a

high rate of speed when it turned into the alley from the street. It was running at a rate of about ten or twelve miles an hour and, evidently, was not under control. The driver of the machine was guilty of negligence in turning into an alley, across the sidewalk of the street without having his machine in control so that he could avoid striking any person passing along the street or crossing the alley. Rupp v. Keebler, 175 Ill. App. 619; Hartwig v. Knapwurst, 178 id. 409.

It is further urged that Webster Stafford, who was running the machine at the time of the accident, was not the authorized agent of his father to take the machine to the garage, and that Russell Stafford had no authority to turn the management of the machine over to his younger brother, Webster. The defendant, however, is not in position in this case to raise this question for the reason that a plea of general issue was filed by him which admitted the ownership of the automobile and that the operator in charge of it was his servant. Chicago Union Traction Co. v. Jerka, 227 Ill. 95; Penn. Co. v. Chapman, 220 Ill. 428.

In our opinion, the court did not err in refusing to give to the jury the instructions asked by the defendant. It was wholly immaterial whether appellant directed his son, Webster Stafford, to drive the automobile around the block to the garage or knew that he was doing so.

The court did not err in refusing to submit special interrogatories asked by the defendant. As stated in L. E. & W. R. R. Co. v. Morain, 140 Ill. 117, the answers to these interrogatories "would have furnished merely evidentiary or probative facts and not ultimate facts, or facts from which the ultimate facts would necessarily result."

Upon a review of the evidence, we are not prepared to say that the verdict of the jury is excessive in amount. The

evidence shows that the plaintiff was seriously injured, his right humerus being broken and his back being injured. The fracture is healed but the evidence shows that the right arm is not as strong as it was before the injury, and that when the plaintiff, in pursuance of his work, is required to use a wheelbarrow, he is compelled to run a strap from the handles over his shoulders to take the weight off his arm. He was in the hospital seven weeks, and although considerable time elapsed between the injury and the trial, the evidence shows he had not recovered his strength and was not able to do the work which he was accustomed to do. We find no evidence of prejudice or passion in the verdict of the jury, and while the amount allowed by the jury for the injury seems to be a liberal one, we do not find any warrant in the evidence for reversing the judgment upon that ground.

The judgment is affirmed.

AFFIRMED.

131 - 19515

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

MARY LACHOTA,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

The record in this cause shows that by leave of court an information was filed, averring "that Mary Lachota, late of the city of Chicago, heretofore, to-wit, on the first day of February, A. D. 1913, at the city of Chicago aforesaid, being the parent of Stella Lachota, age 14, did unlawfully, wilfully and knowingly encourage, aid, cause, abet, connive to the dependency and delinquency to said child, contrary to form of the statutes," etc. A jury trial was waived and the defendant was arraigned and entered a plea of guilty. Thereupon the court found that it had jurisdiction of the subject matter of the cause and of the parties thereto, and "it is considered and adjudged by the court that said defendant is guilty of contributing to the delinquency of Stella Lachota, a child of 14 years, on said plea of guilty." The defendant was sentenced to confinement at labor in the house of correction. The defendant moved to vacate the judgment and the motion was overruled. Error is assigned upon the order of court denying the motion to vacate.

In our opinion the judgment and sentence of the court was void because there is a variance between the judgment and the information. The judgment does not respond to the averments of the information. In Donovan v. The People, 215 Ill. 520 p. 523, the court said:

"To authorize a judgment against a defendant the verdict in a criminal case must be respond to the issues submitted to the jury. Its sufficiency is determined by ascertaining whether it is responsive to and covers the offense charged in the indictment. (12 Cyc. 690.) It must contain, either in itself or by reference to the indictment, every material element of the crime. (22 Ency. of Pl. & Pr. 875.)"

To the same effect is The People v. Lee, 237 Ill. 272.

The information charges one thing, the judgment pronounces the defendant guilty of another thing. The defendant, when she pleaded guilty, did not plead to the offense set forth in the judgment. She did not know what judgment would be rendered at the time she pleaded guilty. The motion to vacate, which she then made, raised the question whether she had been adjudged guilty of the offense charged in the information. There is no averment in the information charging her with contributing to the delinquency to anyone. We think a mere reading of the information and the judgment discloses that the latter has no basis in the former.

The judgment is reversed and the cause remanded with directions to enter a judgment in accordance with the plea of guilty and to resentence the defendant.

REVERSED AND REMANDED.

October Term, 1913. A.D.

336 - 19735

WILLIAM J. BIGLEY,
Defendant in Error,

vs.

JOHN J. SWEET,
Plaintiff in Error.

185 I.A. 202

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

A motion is made in this cause to strike from the transcript of record the stenographic report or bill of exceptions, and to affirm the judgment.

The record shows that the judgment was entered on June 25, 1913, in the Municipal Court of Chicago before Judge Hill on a verdict. A motion to vacate the judgment on the same day was overruled. On August 22, 1913, a writ of error from this court was filed in the Municipal Court. On August 23, 1913, a bill of exceptions was presented to Judge Ryan of the Municipal Court and was endorsed by him as follows:

"Presented Aug, 23rd, 1913. Joseph E. Ryan, Judge."

The bill of exceptions purports to be signed by Fred C. Hill, Judge, on August 23, 1913. On December 16, 1913, an order was entered by Judge Ryan that the bill of exceptions be filed nunc pro tunc as of August 23, 1913. In pursuance of that order, the bill of exceptions was filed on December 16, 1913, as of the 23rd day of August, 1913.

Upon the face of the record it appears, therefore, that the bill of exceptions was actually signed on the 23rd day of August, 1913, within thirty days from the entry of the final order which is sought to be reversed, but that it was not filed in the clerk's office until December 16, 1913. In our opinion the order entered by Judge Ryan on the latter date, allowing the

bill to be filed nunc pro tunc as of August 23, 1913, was void. No basis for the nunc pro tunc order appears in the record. It must be assumed from what appears in the record that the bill of exceptions, after it was signed by the judge, was delivered to the attorney, and it was not through any fault of the judge but solely through that of the attorney that it was not filed with the clerk of the court until many months thereafter. In Hall v. Royal Neighbors, 231 Ill. 185, it was held that where a bill of exceptions is presented to the judge and duly signed and sealed within the time fixed by the order of court for filing the bill, but the party presenting the bill neglects to file it until after the time so fixed has expired the bill is not properly a part of the record and will be stricken from the files on motion.

This case falls within the rule announced in Chicago & Riverdale Lumber Co. v. Gartside et al., 17[illegible] Ill. App. 40. The failure to file the bill of exceptions in time was chargeable to the neglect of the attorney who had possession of it and not to the trial judge. The motion to strike the bill of exceptions or stenographic report must be sustained.

The assignments of error all relate to and are based upon the bill of exceptions and stenographic reports. No question is made upon the common law record in the case. None of the assignments of error can be considered with the elimination of the bill of exceptions or stenographic report from the record.

The judgment of the Municipal Court must be affirmed.

AFFIRMED.

443 - 18912

FRANK SEVRAC,
Appellee,

vs.

CALUMET & SOUTH CHICAGO RAILWAY COMPANY,
Appellant.

185 I.A. 203

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment for $2500 for injuries received from a collision between one of defendant's cars and his automobile at the intersection of Coles avenue and Cheltenham place, Chicago. The former runs north and south and is 66 feet wide; the latter runs east and west and is 50 feet wide. The car was going north on Coles avenue and the automobile east on Cheltenham place. Two hundred and fifty feet south of Cheltenham place, running parallel to it, is 79th street, from which the car, coming from the east, turned into Coles avenue. At the southwest corner of said intersection is a three-story apartment building with a frontage of about 100 feet on Coles avenue.

The witnesses to the occurrence for plaintiff, besides himself, were a man who looked from an east window of an apartment building, and a woman who had an unobstructed view from the window of a cottage on the east side of Coles avenue about 175 feet north of Cheltenham place. All of defendant's witnesses thereto, except a man in a position similar to the woman's, about 50 feet farther north on the other side of the

street, were riding in the street car. The motorman and two of them were on the front platform and the conductor and two others inside the car.

It is urged that the verdict is against the manifest weight of the evidence, which was very conflicting and irreconcilable as to nearly every material fact. The testimony on one side was diametrically opposed to that on the other. Aside from whether the motorman rang his bell, the main controversy was as to the speed at which the car and automobile were running as they approached the intersection and their relative distances therefrom when each came in view of the other. The gist of the evidence for plaintiff was that the car was going much faster than the automobile, and that for defendant that the automobile was going much faster than the car. The real facts depended much on the accuracy of the witnesses' estimates and their ability under the circumstances to form them. They had different points of view, and the opinion of each was based largely upon what took place in the few seconds between the time when the car and automobile came within sight of each other and when they collided. Most of defendant's witnesses testified that the car was running from eight to ten miles an hour. One of plaintiff's witnesses,- a former car conductor, testified that the car was running twenty miles an hour, and there were circumstances, such as the schedule time observed and the distance the car ran after the brakes and reverse were applied, which tended to show that he was nearer correct than defendant's witnesses. The latter testified to seeing the automobile before it reached Coles avenue, from 15 to 50 feet therefrom, and that it was going from 15 to 30 miles an hour. On the other hand, plaintiff testified that he stopped it before entering upon the street crossing, and one of his witnesses testified that she saw it starting up from there, and the other that it was moving slowly across the track when struck by the car.

The snow of the night before had been brushed away from the car tracks about six feet, and plaintiff and one of his witnesses testified that on each side of Coles avenue were ridges of snow two to three feet high across Cheltenham place through which grooves had been made by passing vehicles. Where the snow was brushed away it was frozen and slippery. Before attempting to cross the street in such condition, plaintiff said he stopped and looked for approaching cars, and that after starting up, his attention was given to crossing the ridges of snow in these grooves and guiding the automobile as it slipped over the frozen street, thus causing him to go about as fast as a man would walk,- two to four miles an hour,- so that he did not see the car until it was practically on him. It struck the rear of his automobile, turning it completely around, and stopped from 15 to 100 feet north of Cheltenham place. If the car was going eight or ten miles an hour, or had stopped, as some of the witnesses testified, at 79th street on Coles avenue, plaintiff's description of the situation was impossible; but if the car was running at approximately twenty miles an hour and did not stop, it could have emerged from 79th street upon Coles avenue immediately after plaintiff had looked, and have run into the automobile going at the rate of speed plaintiff testified to, for at such speed the car would run 250 feet while the automobile was going 50 to 60 . Plaintiff's statement, that he stopped his automobile, was supported by the woman's testimony, and that he was moving slowly across the street and had reached the intersection well in advance of the car, was corroborated by both of his witnesses. The woman testified that the car was coming around the corner of 79th street just as plaintiff started across Coles avenue.

It is quite impossible, from a review of the sworn

testimony, to determine definitely what was the correct state of facts, but we are impressed that the various estimates made by the several witnesses of time, speed and distance were largely conjectural, and based, as they were, on impressions received in a very short interval were very uncertain, and some of them quite improbable. Under such circumstances accuracy is not to be expected, and opinions will widely vary, as the record well illustrates, hence, as the latitude for conclusions was great, we are disposed to leave the questions of fact as the jury found them.

There was good ground for holding that defendant was negligent. Some of the witnesses testified that the brakes were not applied until the car had about reached the crossing,- manifestly too late to avoid a collision. The motorman himself testified that they were not applied until the car was about 20 feet from the crossing, and that it could not be stopped within 100 feet when running ten miles an hour. It appears to have gone from 70 to 125 feet after it struck the automobile, and we think from all the evidence it was running much faster than ten miles an hour. There was sufficient testimony to warrant the finding that the defendant failed to exercise proper control of the car as it approached the crossing.

The main point of controversy seemed to be whether or not the plaintiff was guilty of contributory negligence. If the testimony of himself and his witnesses was credible, then the jury were justified in believing that he was exercising due care for his own safety. We find nothing improbable in their testimony. It is consistent with testimony tending to show that defendant's car was running from 18 to 20 miles an hour without a timely effort to control its speed at the crossing. While those on the platform of the car had an equal opportunity with plaintiff's witnesses to estimate relative distance and speed, those

on the inside did not. The testimony of some of defendant's witnesses states what mathematically was not possible. One of them, who stood on the platform, said that when he first saw the automobile it was about 50 feet from Coles avenue, going 20 miles an hour, and that the car was about 25 feet from the crossing, going at 8 miles an hour. Under such circumstances there would have been no collision. Other instances of the uncertainty or improbability of the testimony given might be cited. We cannot say that there was a manifest preponderance of the evidence in defendant's favor. It had the greater number of witnesses, but that is not controlling. The circumstances and conflicting testimony made it particularly a case for a jury to decide what was the real state of facts.

Plaintiff was erroneously permitted, over the objection of defendant, to prove the difference between the market value of the automobile just before and after the accident, which was about $1200. If it could have been repaired, the proper measure of damages was the cost of repairing. The jury were given no rule as to the measure of damages, but were told that in determining the amount of damages plaintiff was entitled to, if any, they might take into consideration besides his physical injuries the injury to his automobile. It is true, as claimed, that under such instruction the jury may have taken into consideration the evidence on market value and, were the claim made and supported that the verdict was excessive, we might be required to reverse for such error. But the proof of the personal injuries plaintiff received might alone justify the verdict and judgment, and in the absence of a contention that the damages are excessive, we do not deem the error referred to as reversible. (Mantonya v. Emerich Outfitting Co., 172 Ill. 92; Comerford v. Morrison, 145 Ill. App. 615; Merry v. Campbell, 118 id. 646;

Chicago City Ry. Co. v. Nelson, 116 id. 609, [affirmed in 215 Ill. 436]; Carterville Coal Co. v. Abbott, 81 Ill. App. 279, [affirmed in 181 Ill. 495])

The modification of certain instructions tendered by the defendant is complained of. One enumerated several of the well-recognized tests of credibility, and, as tendered, told the jury that "from all these circumstances and from others that may occur to you as shown by the evidence," they might determine the credibility of the respective witnesses. The court struck out the clause "and from others that may occur to you." It is urged that the instruction, as modified, was erroneous in that it limited the jury to the tests suggested. (Lyons v. Chicago City Ry. Co., 258 Ill. 75.) The instruction told the jury that in determining where the preponderance or greater weight of the evidence lies, they were entitled to take into consideration several matters, and ended by saying "and from all these circumstances, as shown by the evidence, determine the degree of credibility" etc. It was incorrect both as tendered and modified because in determining either the weight of evidence or credibility of witnesses, the jury should take all the evidence into consideration. However, referring to a similar criticism of a similar instruction, the Supreme Court, in Meyer v. Mead, 83 Ill. 19, said that the instruction could hardly have misled the jury because it did not expressly or by inference exclude from their consideration any fact or circumstance bearing upon the case. A similar ruling was made in Chenoweth v. Burr, 242 id. 312. Defendant is hardly in a position to complain of an instruction which, as to the point raised, was quite as defective in the form tendered as modified. But the jury were told in other instructions that they must look solely to the evidence for the facts; and that "the number of credible witnesses testifying on the one side or the other of a disputed material point is a proper element for the jury to con-

sider in connection with all the other facts and circumstances in evidence in determining where lies the preponderance of the evidence." Hence we do not think the jury was misled by the instruction in question.

In another instruction tendered, relating to the charge of failure by defendant to give a warning, the jury were told that such failure, if proven, would not be enough alone to make the defendant liable in the action, and added, "in order for the plaintiff to recover on this ground the jury must also believe from the evidence that the failure to ring a bell or sound a gong or give a warning, even if there was such a failure, was negligence under all the facts and circumstances in evidence, and that such alleged failure to give warning of the approach of the car was the proximate cause of plaintiff's being injured, and further the plaintiff must prove by the preponderance of the evidence that, at the time and place of the said accident he was in the exercise of ordinary care and prudence for his own safety." The court struck out the last sentence. It is claimed that because the words stricken out remained legible, the jury might have understood that such care on the part of plaintiff was unnecessary if defendant was guilty of a failure to give warning. The necessity of the plaintiff's exercise of due care for his own safety, and of establishing the same by a preponderance of evidence were emphasized in so many other instructions that we cannot assume that the jury were so lacking in ordinary intelligence as to give to the erasure the effect contended for. Such a contention might be made where a jury is not otherwise properly instructed; but when they are, it would reduce the practice of handing the jury written instructions to an absurdity to give force to such a criticism. The instruction in question was not one for a directed verdict. In effect, it told the jury that proof of failure to give a warning was not of itself suf-

ficient for the recovery of a judgment. Other instructions, however, did tell the jury what was requisite to be proved, including the exercise of due care on the part of plaintiff. All of the instructions were given at defendant's request,- nineteen as tendered, thirteen with modification- an unnecessary number to present the law involved - but we do not think, considering them as a whole, the jury was misled by the modifications, and in view of the conflicting proof and the different opportunities of the witnesses to know or correctly judge of the main facts, we think the jury were better able to determine the truth from seeing and hearing the witnesses than we are from reading the record.

AFFIRMED.

11-19363

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,
vs.
JOHN BURGESS,
Plaintiff in Error.

185 I.A. 205

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This case comes here on the assignment of error that the information does not state an offense in that it states it was committed on the first day of February, A. D.,191, an impossible date. "It is laid down as an undoubted principle in all the books," says Hawkins in his Pleas of the Crown, Chap. 25, Sec. 77, "that no indictment whatsoever can be good without precisely showing a certain year and day of the material facts alleged in it;" and "that if an indictment lay the offense on an uncertain or impossible day, * * * it is void." In such a case it fails to charge an offense. (Commonwealth v. Doyle, 110 Mass. 103; State v. Litch, 33 Vt. 87; Terrell v. State, 165 Ind. 443.) Neither in the Doyle case cited nor the one at bar was the question raised in the trial court. In fact here the plaintiff in error pleaded guilty, but to an information that charged no offense. While under such circumstances it would seem as if plaintiff in error ought not to be permitted to raise such question, yet it is a rule of common law that has not been changed by our statutes that "no defect of this kind can be helped by verdict." (See Hawkins' P. C., supra, and State v. Litch, supra.) In the last case the court, referring to the fact that there is now an English statute provid-

ing that mere formal technical objections shall be of no avail after verdict, said what may be appropriately repeated here:

> "We hope some similar action will soon be taken by our own legislature, as justice is too often cheated by these mere clerical mistakes, but we are not at liberty to depart from long and well settled rules, though merely technical."

REVERSED AND REMANDED.

tober Term, 1918. No.

180 - 18589

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

WILLIAM E.CLINE,
Plaintiff in Error.

185 I.A. 206

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

It is assigned as error in this case that the court rendered judgment upon a verdict of the jury that was not responsive to all the issues in the case. The information charged that plaintiff in error "did then and there keep a common, ill-governed disorderly house, kept for the encouragement of fornication, within the limits of the city of Chicago in violation of Sec. 57, Chap. 38, Revised Statutes." The verdict read:

> "We, the jury, find defendant, William E. Cline, guilty of keeping a disorderly house in the manner and form as charged in the information."

In Donovan v. People, 215 Ill. 520, the court said:

> "To authorize a judgment against a defendant, the verdict in a criminal case must respond to the issues submitted to the jury. * * * It must contain, either in itself or by reference to the indictment, every material element of the crime. (22 Ency. of Pl. & Pr. 873.)"

Here an essential element of the offense, as it is defined by statute, was omitted from the verdict, namely, that the disorderly house was kept for "the encouragement of fornication." Had the words "of keeping a disorderly house," which of themselves state no criminal offense, been left out of the verdict, it would have been sufficient and responsive. (People v. Lee, 237 Ill. 272.) In the latter case there was a similar verdict containing only one and omitting other essential elements of the offense, and it was held insufficient because not "broad enough to embrace the finding upon all the essential elements

of the offense." Under the authorities above cited, the judgment must be reversed and the cause remanded for a trial de novo.

REVERSED AND REMANDED.

356 - 18823

OWEN MONAHAN,
Appellee,
vs.
CHICAGO CITY RAILWAY CO.,
Appellant.

185 I.A. 207

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

A judgment in the sum of $8,000, based on a verdict for a like amount, was recovered in this case in favor of appellee, as plaintiff, against appellant, as defendant, for damages on account of personal injuries alleged to have been received by the plaintiff while he was a passenger of the defendant.

The negligence alleged in the original declaration was that when the car in which plaintiff was riding reached the intersection of 55th street and South Halsted street, in the city of Chicago, and had slowed down and was apparently stopping to permit plaintiff to alight, and while he was on the rear platform of said car preparing to alight therefrom as soon as the car should stop, defendant negligently, etc., started said car forward suddenly, etc., without warning to the plaintiff, and as a direct result thereof plaintiff was thrown from the car to the ground, sustaining a fracture of the neck of his left femur.

An additional count was filed, charging that the car had stopped and that while the plaintiff was preparing to alight it started forward suddenly, etc., with a result as stated in the original declaration.

It is first urged by the defendant that the judgment

should be reversed because, as it is charged, the verdict was against the manifest weight of the evidence. Plaintiff was a man upwards of seventy years of age at the time of the accident, and was a carpenter in the employ of the Board of Education of the City of Chicago, in which employment he had been for about fourteen years, his earnings being about $100 per month. Plaintiff testified that he had been at a lodge meeting, and had taken a car to Halsted street, where he transferred to the one from which he claimed to have been thrown; that, desiring to get off at 55th street, when the car was about in the middle of the block between 56th and 55th streets, he went to the rear end platform, where he took hold of the rail of the car; that the car stopped very suddenly and threw him against the end of the car, and that as he raised his foot to get on the car "it shot right ahead again" and he was thrown to the ground.

The only other witness to the accident whose testimony was offered by the plaintiff was a young woman, who testified that she saw the accident as she was coming out of an alley onto Halsted street near the place of the accident.

The witnesses to the accident produced by the defendant consisted of a woman passenger, the conductor and motorman of the car. It is impossible to reconcile the testimony of these three witnesses and that introduced to establish the plaintiff's case.

After careful perusal of the record, we are unable to say that the verdict of the jury is so manifestly against the weight of the evidence as to require a reversal of the judgment on that ground.

It is next complained that the following instruction, given as tendered by the plaintiff, was erroneous:

"5. The preponderance of evidence in a case is not necessarily alone determined by the number of witnesses tes-

tifying to a particular fact or state of facts. In determining upon which side the preponderance of evidence is, the jury should also take into consideration, so far as shown by the evidence, the opportunities of the several witnesses for seeing or knowing the things about which they testify, their conduct and demeanor while testifying, their interest or lack of interest, if any, in the result of the suit; the probability or improbability of the truth of their several statements, in view of all the evidence, facts and circumstances proved on the trial; and from all these circumstances, and a full consideration of all the evidence, determine upon which side is the greater weight or preponderance of the evidence."

We are referred to no case in which it has been held that an instruction in the form of the one under consideration was faulty. It differs from the one criticised in Lyons v. Chicago City Ry. Co., 258 Ill. 75. The concluding words of the instruction were not in the one in the Lyons case,- "in view of all the evidence * * * preponderance of the evidence." The word "necessarily" in the first sentence of the instruction was not in the instruction in the Lyons case, but even if these changes had not been made, under the authority of the Lyons case and decisions referred to therein, the giving of the instruction would not constitute reversible error.

An instruction was tendered by the defendant to the effect that the plaintiff could not recover under the original declaration, and that it was the duty of the jury to find the defendant not guilty "as to said original declaration." We do not understand it to be denied that there was evidence tending to support the additional count of the declaration. It is therefore unnecessary to determine whether or not there was testimony tending to establish the averments of the declaration as it originally stood. It has been held that the erroneous denial of a motion to take from the jury counts of the declaration which there is no evidence tending to prove is not ground for reversal if there is one good count which there is evidence tending to support. Scott v. Parlin & Orendorff Co., 245 Ill. 460.

It is next urged that the damages are excessive and

that the judgment should be reversed because a new trial was not granted on that ground. The age and income of the plaintiff have heretofore been set forth. There is evenidence tending to establish that the neck of the left femur of the plaintiff at or about the time of the trial was almost entirely absent; that the shaft of that leg was about three-quarters of an inch higher than it should be; that there was no bony union between the broken parts; that there was no prospect of a bony union; that the left leg was smaller and shorter than the right one; that plaintiff could not walk without support and could not bear his whole weight on the left leg without great pain. One of the doctors, a witness for plaintiff, testified that he called plaintiff's condition "a good recovery"; that at the time of the trial, which was two and one-quarter years after the injury, the plaintiff had "had all the injury he would ever have"; that "he had a good union." Another of the doctors on cross-examination stated that the bone united. On his re-direct examination he said the union was fibrous, and that for a man of his age, in the opinion of the doctor, he would have a "fairly serviceable joint." The loss to the plaintiff at the time of the trial, on account of inability to work for nearly three years, and the surgeons' bills, aggregated about one-half the amount of the verdict. The jury were authorized also to take into consideration the pain and suffering and the probability of further loss of time during the remainder of plaintiff's life. We are unable to say that the damages awarded are excessive.

The judgment is affirmed.

AFFIRMED.

456 - 18927

JOSEPH WILLEN,
Appellee,

vs.

AMERICAN BRIDGE COMPANY,
Appellant.

185 I.A. 209

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

Appellee recovered a judgment in this case against the appellant, as defendant, for damages on account of personal injuries alleged to have been received by him while in the employ of the defendant, which at the time was engaged in constructing an ore washer building at Coleraine, Minnesota.

At the time of the accident the building had reached such a point in construction that the structural iron workers, among whom was the plaintiff, were engaged in building what were known as "pockets." The steel framework at the top of the pockets was constructed of parallel beams running in an east and west direction and about five feet apart. On these beams the planking was subsequently to be laid for the main floor. The sloping side of the pockets was made by placing planks in position upon the structural steel supports, and over these planks steel plates were laid which were bolted through the planking, the work being spoken of as "lining the pockets."

The plaintiff was working over pocket No. 4, the three other pockets having been lined. Over pocket No. 4 the floor had been placed except for a distance of 2½ or 3 feet of the west end. This was left open in order that plates necessary to line the pocket might be lowered into it and adjusted.

On this floor the men would stand when lowering plates into the pockets. It was customary and necessary for the men where there was no planking to go about on the beams, this being one of the hazards of the employment.

The plaintiff testified that on the morning of the accident he was working on the other side of the building from the fourth pocket, about fifty or sixty feet away, tightening bolts; that about 11:30 he was ordered by his foreman to work under one Thompson, a sub-foreman, that Thompson told him to "get a plate from the bottom, to take the other plates that were on top off and take the bottom out"; that there were ten or twelve sheets or plates piled there, and that the sheet he was after was on the bottom; that about three or four more sheets were on top, and that he was going to take the tackle and look for the plate. He testified, "I stepped on the plate and it slipped and I fell"; that the plates appeared to be all right and had been piled there (evidently meaning the planks which covered a part of the fourth pocket) by laborers who were working on another gang, and that he had to cross the plates in order to get to the tackle. He further testified: "I had to step about eight feet to cross the plates, I don't know how high they were, I did not pay any attention to those plates, and don't know how high they were or how many there were in it."

Another witness for the plaintiff, one Wiggins, testified that there were ten or twelve plates in the pile, when he looked about ten minutes after the accident; that the first he saw of the plaintiff was when he was lying on the track after his fall.

A third witness for the plaintiff says that the plates were not piled at all but were just "dropped there."

The sub-foreman, Thompson, a witness for defendant, testified that he saw the accident; that the plate in question had been brought by plaintiff and three other men; that it weighed about fifty pounds, and that while Miller was in the act of attaching the tackle to the plate he accidentally slipped and fell.

One Dezaleich, a witness for defendant who did not see the accident, testified that he was one of the other three men spoken of by Thompson. A third witness for defendant also testified that he saw the plaintiff with three other men carrying the plate; that they laid it on the temporary floor near the pocket and shoved it sideways toward the pocket; that the plaintiff hooked the tackle to the plate; that there were no other plates except the one in question on this particular floor; that the plaintiff did not fall into the pocket but "fell on the other side of the pocket or from the other side." A fourth witness for the defendant testified that directly after the accident he saw the plate on the scaffold, and that the hook was in the hole on the east side of the plate.

We are of the opinion that the preponderance of the evidence was clearly with the defendant, but we do not deem it necessary to base the decision of the case upon that ground. The decision may rest upon the testimony of the plaintiff, construed most favorably for him. By his evidence it was established that the risk of danger was known to him, or in the exercise of ordinary care would have been known to him, and the further proposition was established that as a matter of law, he was guilty of contributory negligence. It will be noted from what has been given of his testimony that in one place he states that there were ten or twelve sheets or plates piled, and in another that he did not pay any attention to the plates or know how high they were piled or how many there were in

the pile. It is clear that it was his duty to ascertain how high the pile of plates was and what condition it was in before he attempted to use it for a purpose for which it was not designed.

The evidence in the case is undisputed that it was customary and necessary for the men at times to go about on the beams, and that that was one of the risks that a structural iron worker is required to take.

The general rule is that the duty of exercising care to furnish a reasonably safe place to work resting upon the employer is absolute. "But to this general rule there is the well known exception that the master is not liable where the danger to which the employe is exposed is merely a transitory one, due to no fault of plan or construction, but is one where the work is of such a character that as it progresses the environment of the servant must necessarily undergo frequent changes, and the injury is traceable to one of these transitory changes. This exception finds its illustration for the most part in cases involving the construction of works." Armour v. Dunne, 95 S. W. R., 710, Armour v. Hahn, 111 U. S., 313; Richardson v. Anglo-American Provision Company, 72 Ill. App. 77, Falkenau v. Ginley, 151 Ill. App. 599; Latrobe Steel & Coupler Co. v. Hagan, 160 Ill. App. 440.

The instruction tendered by the defendant directing the jury to find a verdict in favor of the defendant should have been given. The judgment will therefore be reversed.

REVERSED.

480 - 18951

THOMAS HART,
Appellee,

vs.

SCULLY STEEL & IRON COMPANY,
a corporation,
Appellant.

185 I.A. 210

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

Judgment was rendered in this case upon a suit brought to recover damages claimed by appellee-plaintiff, of the appellant-defendant, for injuries sustained by him while in the employ of the defendant. The judgment was based on the verdict of the jury.

A wagon load consisting of six steel plates, about forty feet long, eight inches wide and a quarter of an inch thick, was brought to the platform of a railroad station, there to be loaded on a gondola, or coal car, for shipment. On the platform was a hoisting derrick, used in the work of transferring material from wagons to cars and from cars to wagons. The plates, when on the wagon, rested on two angle irons, the flanges of which were downward. The angle irons were about thirty feet long, the flanges being about six by six inches. Four pieces of short timber separated the plates from the angle irons. The whole load, plates and angle irons, was hoisted in one movement from the wagon to the car by means of the derrick and a chain. As the angle irons were not to be shipped it became necessary to get them out from under the plates and put them back upon the wagon. The contention of the plain-

tiff is that the ordinary way of accomplishing this was to lift the plates by means of chains and the derrick and draw out the angle irons from underneath. The plaintiff, who had unhooked the chain from the whole load, testified that in pursuance of the usual custom he was in the act of putting the chain around the plates that they might be lifted, when his foreman took it away from him, and with plaintiff's assistance fastened it around the angle irons and immediately signalled the derrick man to hoist; that this order was obeyed, with the result that the angle irons were jerked from beneath the plates; that the foreman was on the south of the car, and plaintiff on the north side; that plaintiff attempted to get to a position of safety on the north sideboard of the car but that before he was able to do so the angle irons caught his left leg and crushed it against the side of the car.

As to the method of getting out the angle irons from underneath the plates, the plaintiff was corroborated by one witness called by the defendant. Two witnesses, namely, Yanky, the foreman, and another employe of the defendant, Trabla, testified that the method adopted by Yanky was the usual and customary one.

Without discussing the reliability to be placed upon the testimony of the witnesses, respectively, we state it as our opinion that the determination of the question, as reflected in the verdict of the jury, is not manifestly against the weight of the evidence.

It is said that the plaintiff and Yanky, the foreman, were fellow-servants. If the manner adopted by the foreman, as charged by the plaintiff, was an improper and unsafe one, the foreman by participating in the work did not divest himself of the character of foreman and assumed that of a co-

laborer with the plaintiff. He was in control of the work in hand, and in ordering it to be done, or doing it, he was still a vice-principal of the defendant.

The case is not unlike that of Deacon v. Kelly-Atkinson Construction Co., 177 Ill. App. 107, heard in this court. The opinion in the case last referred to was made final by the denial of the Supreme Court of a petition for certiorari. In this case, as in that, the direction to the man in charge of the hoisting apparatus was given by the foreman. There is evidence in the present case tending to show that such direction was not ordinarily given while any one was upon the car from which material was being hoisted. The foreman, who was on the south side of the car, was able after giving the signal to get to a place of safety; the plaintiff, being on the north side, in which direction the pulling of the chain would naturally cause the chain and angle irons to go, was not so fortunate. As in the case last referred to, we are of the opinion that in giving his direction to the man in charge of the hoisting apparatus Yanky was acting as foreman, and consequently the risk of accident was one not assumed by the plaintiff.

We have carefully considered the alleged errors of the court in refusing to give certain instructions tendered by defendant. In so far as these instructions were proper they were substantially covered by others which were given, twenty-three tendered by the defendant being given in addition to seven proffered by plaintiff.

The judgment will be affirmed.

AFFIRMED.

October Term, 1916.

4GS-18983

MARCUS M. WHITNEY, Executor, etc., Appellee,

vs.

CHICAGO RAILWAYS COMPANY, a Corporation, and THE CITY OF CHICAGO, a Corporation, on Appeal of CITY OF CHICAGO, Appellant.

185 I.A. 211

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

Suit was brought by the executor of the estate of Fred A. Whitney, deceased, against the Chicago Railways Company and the City of Chicago, for damages on account of the death of the testator by wrongful act. The accident occurred at the crossing of two streets in the city of Chicago. The testator was riding in a two-horse truck driven by another; the front wheel of the wagon dropped into a hole or rut located about two feet from the tracks of the Railways Company. There was testimony tending to show that this portion of the street had been in bad condition for many months, and the fact was not disputed. The jury, at the direction of the court, found a verdict of not guilty as against the Chicago Railways Company, and thereafter rendered a verdict against the City of Chicago in the sum of $1,500.

No cross-errors are assigned, and the case is before us on the appeal of the City. The grounds alleged for reversal are that the court erred in instructing the jury to find a verdict of not guilty in favor of the Chicago Railways Company; in giving and refusing certain instructions, and in rulings on the admission of evidence.

Without passing upon the question as to whether or not error may be assigned upon the point we are of the opinion that under the facts in the case there could have been no recovery against the Railways Company, and a verdict in its favor was properly directed.

It is urged that only nominal damages should be allowed because, it is averred, there was no proof of any actual pecuniary loss. The testator had four brothers and one sister; the sister was a widow. There was evidence tending to show that for the last two or more years of his life he had lived with his sister, paying her for board, and in addition to that has assisted her by buying her clothing, giving her money, and otherwise aiding her in maintaining an existence. There was proof, therefore, of pecuniary loss. This testimony we think made improper the instruction tendered by the City and which the court refused to give.

It is next urged that error was committed in allowing a doctor to testify to an ultimate fact, namely, that the testator died from the effects of the accident. The accident happened on April 5, 1911; death occurred sixteen days later. The result of the accident was a splintered fracture involving the upper two-thirds of the femur bone. A few days after the accident the splintered bone was wired together by a surgeon in a hospital. The surgeon's testimony was to the effect that hypostatic pneumonia, which was the immediate cause of death, was due to the shock of the accident, the shock of the operation, the ether which was necessarily used in the operation, and the enlargement of blood vessels induced by the dependent or recumbent position in which he was required to be because of the accident and the operation which the accident made necessary.

We are of the opinion that there was proof tending to establish the accident as the proximate cause of the death of plaintiff's testate. Beauchamp, Admr., v. Saginaw Mining Co., 50 Mich. 163.

It is said the doctor did not make sufficient examination to qualify himself to say, as he did, that the deceased was in good condition prior to the accident. The testimony was allowed to remain in the record, together with the cross-examination which brought out the fact that he based his opinion upon the examination that had been made by the interns. This was hearsay, and the motion to strike from the record the answer given on his direct examination should have been allowed. It was not claimed that the deceased was in bad health before the accident, and it was shown by other and competent evidence that he was in good condition. We do not think the error, therefore, should cause a reversal of the judgment. Greinke v. Chicago City Ry. Co., 234 Ill. 564.

The judgment is affirmed.

AFFIRMED.

October Term, 1913. No.

117 - 19500

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

ROBERT WALLACE,
Plaintiff in Error.

185 I.A. 213

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

The information in this case charges that Robert Wallace on February 18, 1913, at Chicago, "did unlawfully, willfuly and knowingly encourage, aid, cause, abet and conive at the delinquency of one Dorothy Rochenbusch, a minor female child under the age of 18 years, to-wit, 16 years, and did then and there knowingly and willfuly do acts that directly produced, promoted and contributed to conditions which rendered said Dorothy Rochenbusch a delinquent child, in that the said Robert Wallace did then and there take the said Dorothy Rochenbusch to a room in the Ontario Hotel at 616 No. Clark St. in the City of Chicago, contrary to the form of the statute," etc.

The judgment is sought to be reversed upon assignments that error was committed by the court in overruling the motion of the defendant to quash the information, and also the motion in arrest of judgment. That portion of the information ending with the words, "16 years," charges a crime in the language of the statute. The remaining portion should be regarded as surplusage. In our opinion "the nature of the offense," as set forth, "may be easily understood," and section 6 of division II of the Criminal Code applies.

The judgment will be affirmed.

AFFIRMED.

October Term, 1913. 40.

515 - 19714

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,
vs.
ETHEL MELVILLE,
Plaintiff in Error.

185 I.A. 214

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

Defendant was found to be "guilty of criminal offense of aiding, abetting and contributing to the state of delinquency of a certain child," etc. The writ of error from this court was filed in the Municipal Court on July 31, 1913, and on that day also a stay bond was entered into and filed.

It is urged that, the judgment should be reversed because the record shows no arraignment and plea. Upon reference to the record we find that arraignment and plea are shown. It is said, however, that on August 8, 1913, an order was entered "expunging from files and record the order of June 27, 1913, showing arraignment and plea." If such an order was entered it was after the suing out of the writ of error and the filing of the same, and may not be considered by us. The record must be taken as it stood on the day of the issuance of the writ of error, which was the beginning of a new suit. Cleary v. Holmes, 238 Ill. 577.

The record shows that the trial was by consent before the court without a jury, and in such case the failure to arraign is not reversible error. Johnson v. The People, 32 Ill. 314.

No motion to quash the information was made, and the

record does not contain a bill of exceptions. The information is in the following form:

> "That Ethel Melville, late of the said City of Chicago, heretofore, to-wit: on or about the 15th day of June, A. D. 1913, at the City of Chicago aforesaid, did then and there contribute to the delinquency of one Anita White, a female of previous chaste life under the age of sixteen years by supplying her with clothing and persuading her to visit houses of ill-fame with one Clarence Jennings, and did knowingly do such acts that directly produced the conditions which rendered such child a delinquent child, viol. Sec. 48, H. B. Chap. 38 Revised Statutes, contrary," etc.

In our opinion an offense was charged by this information, though defectively. It was therefore necessary, in order to raise the question, for the defendant to make a motion to quash. Long v. The People, 135 Ill. 435.

The judgment will be affirmed.

AFFIRMED.

1917

52 - 18489

FRED E. JAHP, doing business as FRED E. JAHP & COMPANY,
Defendant in Error,

vs.

THOMAS E. D. BRADLEY and JOHN T. LILLIS, Executors of the Estate of AUGUSTA R. FITZSIMONS, deceased,
Plaintiffs in Error.

185 I.A. 215

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Augusta R. FitzSimons died March 20, 1911. Among other effects left by her were two coach-horses. Fred E. Jahp, plaintiff below, a dealer in horse feed, furnished feed for the horses during March, April, May and part of June, deliveries sufficient for a month being made on the first day of each of said months. Plaintiff filed a claim in the Probate Court of Cook County against the estate of Mrs. FitzSimons for the amount of his bill for feed furnished during these months. The court allowed only for the delivery of March 1st, and disallowed the remainder of the account as a claim against the estate. Plaintiff then sued Thomas E. D. Bradley and John T. Lillis, executors of the estate of Augusta R. FitzSimons, deceased, for the balance of his claim, and obtained this judgment, which the defendants seek to have reversed.

The judgment runs against Bradley and Lillis as executors of the estate of Augusta R. FitzSimons, "to be paid in due course of administration." Such a judgment was improper. No action will lie against an executor in his representative character upon a claim which accrued subsequent to the death of the testator. Foley v. Bushway, 71 Ill. 386; Morgan v. Morgan, 83 Ill. 196. As stated in Cyc., vol. 18, page 880, and supported

by abundant authority, the general rule is that no action will lie against an executor or administrator in his representative character except upon some claim or demand which existed against the testator or intestate in his lifetime, and if a claim or demand accrues in the time of the executor or administrator he is liable therefor only in his personal character. Contracts of executors and administrators, although made in the interest and for the benefit of the estate they represent, if made upon a new and independent consideration moving between their promisee and themselves, are their personal contracts, which do not bind the estate, and they must be sued on these contracts in their individual and not in their representative capacity. The fact that they are described in a contract as representatives does not affect the rule, and although they are named in the declaration or complaint as representatives, this will be considered merely descriptio personae, and will be treated as surplusage or as intended to show the nature and origin of their liability; it cannot affect the form of the judgment. So where the pleadings disclose a cause of action by one against a person in his individual capacity, the superadded words, as "executor," "trustee," etc., should be rejected as descriptio personae. Personal repsentatives must be sued in their individual capacity on notes or bonds executed by them or on contracts made by them for the payment for services of an attorney. They also must be sued in their individual capacity for work and labor performed at their request, and they are liable individually for goods furnished at their request.

No reason has been presented, and none occurs to us, why an executor would not be liable individually for feed purchased during his administration, for live stock which is part of the estate, although he may not directly have ordered the purchase of feed. However, this particular question may

be determined upon another trial.

While the testimony of the superintendent for the plaintiff, testifying as to the account, is somewhat uncertain as to the exact amount due, still he does say that the feed described in the statement of account was furnished and that the amounts charged are the usual market prices. The affidavit of defense does not question the correctness of the statement, and there seems to be no well-founded dispute as to the amount of the balance due.

For the error above indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

378 - 18845.

185 I.A. 217

LEILA BURDELL EATON, by her next friend, Louis [illegible],
Appellant,

vs.

WESTERN LIFE INDEMNITY CO.,
Appellee.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

STATEMENT BY THE COURT. This is an appeal from a judgment of the Superior Court entered upon a directed verdict for the defendant. The suit was brought to recover the amount claimed to be due upon a membership certificate, in the nature of an insurance policy, issued by the defendant, a corporation organized under the act of June 18, 1883, for the purpose of "furnishing life indemnity" upon the assessment plan to the widows or heirs of deceased members. The membership certificate or policy was issued to Frank N. Eaton, the father of the plaintiff, on April 20, 1886. It provides that in consideration of the payment of all dues and assessments made pursuant to the by-laws, the company will pay $3,000, "and all moneys paid on the policy in assessments", to the wife, children or heirs of Eaton within sixty days after notice and satisfactory proof of his death; that any failure to pay assessments "as provided in conditions printed on the back of this policy, shall forfeit the membership" of the insured "and all benefits arising therefrom"; that the insured is permitted to reside in any settled portion of the Western Hemisphere lying north of the Thirty-second Parallel of north latitude, at all seasons of the year, and in the United States lying south of the Thirty-second Parallel, excepting from July 1 to November 1, in each year, and in certain described parts of the Eastern Hemisphere; that he may also "pass as a passenger by the usual routes of public con-

veyance to and from any port or place within the limits" thus described, but if he shall at any time "pass beyond or be without the foregoing limits * * * or if he shall enter into military service, whether voluntarily or otherwise (the militia when not in actual service alone excepted), without the consent of this Company previously given in writing, * * * then, in each and in every of the foregoing cases, this Policy shall become null and void, and the widow and heirs or devisees of said member shall have no claims for benefits on this Company". Upon the back of the policy are printed the constitution and by-laws of the Company and they are expressly declared to be a part of the contract. Section 4 of article IV of the constitution provides that "upon the death of any member an assessment, increasing with age, shall be made upon the surviving members (provided an assessment is needed) according to the following table of rates" (giving a schedule of rates), "but no assessment shall be made so long as the money in the death fund will pay the maximum loss in full". Sections 1 and 2 of article V of the constitution provide that "seventy-five per cent. of all moneys arising or accruing from assessments shall be placed to the credit of the death fund, which shall be used for no other purpose than the payment of death losses"; and that "all other moneys shall be placed in a contingent fund, out of which the expenses and emergencies are to be met, and all the remainder, or surplus, shall be invested in some reliable trust for the payment of the Bonds, as herein provided". The bonds thus referred to are described in later clauses which provide that at the end of each ten years' membership each member shall receive a bond, bearing three per cent. interest, for such a proportion of the surplus, as all the money paid by him during such ten years bears to the whole amount received by the Company during the same period. Article VI of the

constitution provides that upon the death of each member, "should it be necessary to make an assessment", the Company shall send by mail to the last recorded post office address of every member, a notice containing the name and residence of the deceased member, and the amount due from the member to whom the notice is sent; that such notice shall be deemed and taken to be lawful and sufficient notice of such assessment; and that "should anyone fail to forward, as indicated in the notice, the amount thus due, for a period of ten (10) days after the date of said notice, he shall forfeit his membership and all benefits arising therefrom".

It appears from the evidence, that on January 11, 1898, sundry claims were approved by the board of directors and two assessments were ordered to be levied on the surviving members, notice thereof to be given February 1, 1898; that a notice of these assessments was mailed to Frank N. Eaton, at LaCrosse, Wisconsin, where Eaton was living at that time; that Eaton did not pay the assessments, and that the record of his policy on the Policy Register of the Company was stamped "Cancelled for Non-Payment, Feb. 1898". In April, 1898, Eaton enlisted in the United States military service during the war with Spain, and was sent to Porto Rico, where he contracted malaria, from which he died in November, 1898, leaving no widow, but leaving him surviving one child, the plaintiff, then about three years old. Soon after his death a guardian was appointed for the minor child, and in June, 1899, the guardian wrote a letter to the defendant, requesting payment of the life insurance and enclosing an obituary notice clipped from a newspaper, stating that Eaton had enlisted in the third regiment of Wisconsin volunteers, had gone with his company to Porto Rico in August, 1898, and was there stricken with malarial fever, from which he died. To this letter the Company replied that Eaton's policy had been cancelled for non-payment of the February, 1898, assessment, and that "therefore there is

no claim against this Company on account of said policy". This suit was brought on the policy more than ten years later, in October 1909. Several pleas were filed to the declaration, and replications to these pleas were filed. None of the pleas set up any defense on account of Eaton's enlistment or travel beyond the limits described in the policy. During the trial, however, it was agreed by counsel in open court that the defendant might introduce any evidence proper to be introduced under any plea which might properly and legally be pleaded to the declaration, and that the plaintiff might introduce any evidence proper to be introduced under any replication then on file or which could be filed in answer to any such plea of the defendant.

To show the necessity for making the assessment of February 1, 1898, the defendant introduced its records, showing that at a meeting of the board of directors in January, 1898, proofs of the death of two members were submitted and that claims to the amount of nearly $20,000 were approved, whereupon a resolution for the assessment was adopted. This resolution recites that "Whereas, the Mortuary losses allowed are about to become due and payable and there is no money in the Death Fund, (as shown by our books) to pay the same", therefore it is resolved that two assessments be made to pay two specified death claims, such assessments "to be issued February 1, 1898", and that one notice for the two assessments be mailed to all policy holders. Defendant also produced oral testimony to the effect that there was no money in the death fund at the date of the levy of the assessment. The books and reports of the Company showed, however, that the Company had in its "contingent fund" assets of more than $300,000 in excess of all pending claims against the Company, of which assets there was then a sufficient amount in cash to pay all pending death claims. At the conclusion of all the evidence, the court instructed the jury to find a verdict for the defendant.

MR. PRESIDING JUSTICE ITCH
DELIVERED THE OPINION OF THE COURT.

It is first urged that the defendant waived, or was estopped from interposing, any defense other than a forfeiture for non-payment of assessments, because, it is said, when demand for payment was made, the Company based its refusal to pay upon that sole ground, although it was then fully informed as to the facts regarding Eaton's military service and of his going beyond the territorial limits named in the policy. We think the contention is not tenable. "An insurance company is not restricted in its defense in an action on a policy, to the reasons assigned in its refusal to pay, if it does not appear that the plaintiff has been misled or influenced to his injury by the omission or failure to set forth other reasons". Weston v. State Mut. Life Ass. Co., 234 Ill. 492, 501. There is no evidence that the plaintiff or the plaintiff's guardian was in any manner misled or influenced to her injury by the failure of the Company to assign other reasons for its refusal to pay than the non-payment of assessments.

It is next urged that the defendant cannot raise the defense that the deceased violated the provisions of the policy regarding residence and military service, because such defense was not specially pleaded. We think plaintiff is bound by the stipulation upon this point entered into in open court. It is true that no formal, signed stipulation was made and filed, but the record shows that during the trial, after a discussion concerning the state of the pleadings, the court made the following statement: "Let the record show that it is agreed by counsel for both parties that there may be introduced in evidence in this case any evidence in support of any plea which might properly, legally, be pleaded to the declaration now on file", etc. The record does not show that plaintiff's counsel objected to

this statement of the court, or that he signified in any manner or form, his desire or intention to dissent therefrom. His silence at that time was equivalent to acquiescence on his part. As the case was tried thereafter on that theory, he cannot now be heard to assert that he did not so stipulate.

It is also claimed that the February, 1898, assessments were invalid because, it is said, the proof does not show that the assessments were necessary. There is no evidence to contradict the defendant's evidence upon this point, viz: that, at the time of the levy of these assessments, there was no money in its mortuary or death fund. In view, however, of the fact that the evidence shows that the Company had a surplus fund amounting to $300,000 in excess of all pending claims, it is insisted by appellant's counsel that it was the duty of the defendant to use this surplus for the payment of accruing death claims; and that so long as there was enough in the surplus fund to pay the accruing losses, it was unnecessary, and therefore contrary to the by-laws, to levy an assessment. Appellant's counsel have cited a number of cases in which such a rule was applied, but in each of such cases it appears either that the law under which the corporation was organized, or the by-laws of the corporation, contained a provision to the effect that no assessment should be made whenever there was sufficient money in the treasury to pay the pending death claims. The law under which the defendant corporation was organized authorized it "to provide by by-laws for the accumulation of a surplus, general, or guarantee fund" to be invested in convertible securities, and used "only for mortuary assessments without assessment, or applied in payment of future assessments, or otherwise used for the promotion of the object or objects for which such funds are specially provided and set apart". (Hurd's Stats. 1885, p. 733) The constitution of the defendant Company provides for the creation of two funds, one

known as the mortuary or death fund, and the other a contingent fund: that seventy-five per cent. of all moneys realized from assessments shall be placed to the credit of the death fund, which fund shall be used solely for the payment of death losses; that the remainder shall be placed in the contingent fund, which fund is to be used, first, for the payment of all expenses and to meet all emergencies, and second, to be invested and held as security for the payment of the bonds provided for in the constitution. These bonds, when issued, may be used for the payment of assessments, or held by the member. These provisions of the constitution and by-laws were printed upon the back of Eaton's policy and were expressly made a part of his contract. It cannot well be claimed that there was anything unlawful in the accumulation of such a surplus fund in view of these statutory and contractual provisions. Obviously, it would be impossible to "accumulate" any such fund, if no valid assessment could be made so long as there was any surplus sufficient to pay pending claims. Nor do we think there is anything in the claim that the assessments were excessive. The evidence shows that a number of other death claims were pending and had been approved prior to the levy of these assessments. Under defendant's constitution it would have had the right to levy an assessment upon the death of each member. Instead of so doing, however, after the death of eight or ten members, two assessments only were levied. We think it appears that these two assessments were necessary, under the circumstances shown by the evidence. There is nothing in the record to show that the death losses, for which the February, 1900, assessments were levied, were in any sense "emergency" losses. Hence, under the by-laws, they were not properly payable out of the contingent fund. The language of the statute in question, and the provisions of the constitution and by-laws of the defendant, clearly imply that when a surplus fund is created,

the ordinary death claims shall not be paid out of such fund except in case of some emergency, such as (probably) the failure of an assessment to produce a sufficient amount to pay in full the claims for which the assessment was made, or an epidemic among the members, or some similar, extraordinary or unusual occurrence.

The remaining questions raised and discussed by counsel are included in the general assignment that the court erred in directing a verdict. Upon that question the rule in this state is stated as follows in Wallner v. Chicago Traction Co., 245 Ill. 148, 152: "The question presented by such a motion is not necessarily * * * whether the evidence tends to support the allegations of the declaration, but is whether there is evidence legally tending to sustain a verdict against the party making the motion. (Wolf v. Chicago Sign Printing Co., 233 Ill. 501.) The question therefore depends upon the character of the issue. Where evidence of an affirmative defense is offered, as in this case, it is proper to direct a verdict for the defendant, even though all the averments of the declaration are proved, if the evidence of the affirmative defense is not contradicted or explained". Applying this rule to the facts of this case, we find that there were several affirmative defenses; that there was evidence tending to prove all of such defenses and none contradicting or explaining the same. It was shown, without contradiction, that the deceased, in violation of the conditions of his policy, entered the military service of the United States without the written consent of the defendant; that without such consent he also passed beyond, and remained without, the territorial limits described in the policy contrary to the stipulations thereof; and that he failed to pay two valid assessments, after due notice thereof had been given him in accordance with the by-laws. Uncontradicted proof of any one of these affirmative

defenses would have been sufficient to justify the court in directing a verdict for the defendant. The facts being undisputed, the issues presented were issues of law. This being true, it follows that the court did not err in directing the jury to return a verdict for the defendant.

It is contended that the restrictive conditions in the policy are contrary to public policy and void. No decision to that effect has been cited and we know of none. We see no reason why parties to an insurance contract may not agree upon such conditions if they see fit to do so in good faith and without compulsion.

For the reasons indicated, the judgment of the Superior Court will be affirmed.

AFFIRMED.

399 - 18866.
15866

SAM BARNETT and GEORGE BARNETT, co-partners, doing business under the firm name of BARNETT BROTHERS, Appellants,	)	195 I.A. 218
vs.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY.
JOSEPH FRIEDMAN, D. J. FRIEDMAN and JOHN P. TANSEY, Appellees.	)	

STATEMENT BY THE COURT. By this appeal it is sought to reverse a decree of the Circuit Court dismissing appellants' bill of complaint for want of equity and granting relief as prayed in the cross-bill of one of the defendants. The original bill recites that the defendants, David J. Friedman and Joseph Friedman, sold the complainants certain diamonds and jewelry for $4700, part of which was paid in cash and the remainder by giving the note of Sam Barnett for $1700 payable in thirty days to the order of David J. Friedman; that at the time of the sale, the Friedmans guaranteed the weight of the diamonds to be as stated upon the tags attached to the various pieces of jewelry, and agreed "that if the stones were not of the value and weight and character as shown upon the tags respectively, any deficiency might be deducted from such note"; that being unable to dispose of the jewelry within thirty days, complainants paid $700 on the note, and Sam Barnett gave a new note for the balance, $1000, payable in sixty days, which was executed and delivered "upon the same conditions and agreement" as the $1700 note; that complainants then sold some of the jewelry to various customers, all of which was returned to them and they were obliged to refund the money, because the jewelry so sold was not of the weight and character represented by the tags; that complainants then examined the jewelry and discovered that nearly all the diamonds were under weight; that they communicated these facts to the

Friedmans and demanded a return of the money paid and a cancellation of the note, or "an amicable adjustment in accordance with the true state of affairs", but the Friedmans refused to do either, and thereupon entered into a conspiracy with the defendant Tansey to defraud complainants, whereby the note was transferred to Tansey with full knowledge of the conditions under which the note was given; that Tansey brought suit on the note in the Municipal Court of Chicago, and that unless restrained by injunction from prosecuting that suit, complainants will be unable to present their equitable defense; and that the defendants are "financially wholly irresponsible". The bill prays that the contract of sale and the $1000 note be cancelled, that the suit in the Municipal Court be enjoined, and that the Friedmans be required to refund the money paid. A preliminary injunction was issued.

The defendant Tansey answered, denying that he had any knowledge of the alleged transactions between complainants and the Friedmans and averring that without any fraud or conspiracy the $1000 note was assigned to him before maturity for a valuable consideration, and that he is the legal holder and owner thereof. Defendants Joseph and David J. Friedman answered, admitting the sale of the jewelry, the giving of the note for $1700 and the later one for $1000, but denying their alleged financial irresponsibility and denying that they guaranteed the weight and quality of the diamonds, as alleged in the bill of complaint, and alleging that the $1000 note had been sold to Tansey prior to the maturity thereof for a valuable consideration.

Replications were filed to these answers and Tansey filed a cross-bill, praying that the complainant Sam Barnett be required to pay him whatever should be found due upon the note. To the cross-bill Sam Barnett answered that the note was

transferred to Tansey without any consideration and that Tansey was not a bona fide holder of the note. A replication being filed to said answer, the cause was referred to a master in chancery, who took the evidence and reported the same with his conclusions. The master found the facts regarding the sale to be substantially as alleged in the original bill. He also found that Tansey took the note in question for an old, pre-existing debt for insurance money and other accounts; that "he did not take it outright, as relying on it for the payment of the debts in question, but relying on Friedman"; that the jewelry sold was the property of the deceased father of the Friedmans and that the sons "had no right to use the note to discharge their own debts"; and concluded that Tansey was not such an innocent purchaser of the note as to prevent complainants from setting up their defenses to it. The master recommended that a decree be entered in accordance with the prayer of the bill and that the note be delivered up to be cancelled.

Sundry objections were filed to the master's report, which were overruled. These objections were allowed to stand as exceptions. Three of the exceptions, relating to the findings of the master with reference to Tansey's connection with the matter, came on for hearing before the chancellor and were sustained. Thereupon an amendment to the bill of complaint and a supplemental bill were filed.

The amendment alleged that Tansey and Joseph Friedman were partners in the insurance business; that the transfer of the note to Tansey was a partnership transaction and the proceeds of the note, if collected, "would be jointly owned by said Tansey and Joseph Friedman"; that Tansey knew that the jewelry sold by the Friedmans was not their property, but belonged to the estate of their deceased father, and therefore should have known that the note belonged to the estate and not to them. The supplemental

bill alleged that after the original bill was filed, the Friedmans settled all their accounts with Tansey and paid him all that was coming to him on the accounts for the payment of which the note was transferred; that in such settlement D. J. Friedman became the legal owner and holder of the note and that Tansey had no further interest therein. Answers were filed to the amended and supplemental bill, and the cause was re-referred to the master to take further evidence as to the issues made by these additional pleadings. Further evidence was taken before the master, from which the master found that at the time of the sale, David J. Friedman had no title to the diamonds and no right to sell the same, and that consequently the note was given without consideration; that Tansey knew these facts and only took the note "tentatively, in settlement of certain old debts, * * * but still looked to the Friedmans to pay these various sums of money." Objections were filed to this report and overruled, and were afterwards allowed to stand as exceptions. Upon the hearing before the court the exceptions were sustained. The bill as amended and the supplemental bill were thereupon dismissed and a decree entered in accordance with the prayer of the cross-bill, finding that Tansey was the legal owner of the note in question and entitled to a judgment against Sam Barnett for the amount of the same, with interest.

MR. PRESIDING JUSTICE FITCH
DELIVERED THE OPINION OF THE COURT.

The errors assigned are practically all included in the single assignment that the court erred in entering a decree "wholly contrary to the report of the master in chancery". On a careful examination of the record we find that the evidence of Tansey, as to the circumstances under which he became the owner of the note in question, is uncontradicted. From his evidence it appears, without contradiction, that be-

fore the maturity of the note Tansey acquired it for a valuable consideration and deposited the same in his bank for collection. The whole controversy, therefore, turns upon the question whether Tansey acquired the note in good faith and without notice of any defense to the same which might have been made if suit had been brought thereon by the payee, David J. Friedman. There is no evidence in the record tending to support the allegations of the supplemental bill. There is no allegation in the original bill, or the amendments thereto, charging that the Friedmans did not have title to the diamonds and jewelry which were sold to Barnett and did not have full right and authority to sell and convey the same. The only allegation relating to that question is a statement in one of the amendments to the bill to the effect that Tansey well knew that the defendants friedmans were not the owners of the jewelry and knew that it was originally the property of the father of said Friedmans and after his death became a part of his estate, and that therefore, Tansey should have known that the defendants, Joseph and D. J. Friedman, had no right to sell the jewelry in their own name, and should also have known that any note given for the purchase price of the same would be the property of the estate and would not be transferable by any one except the legal representative of the deceased. Tansey admits that he was told by one of the Friedmans that the note had been given in part payment for certain diamonds and jewelry which they had sold Barnett, and that these diamonds and jewelry were part of the estate of the deceased father of the Friedmans; but Joseph Friedman testified that his mother was the administratrix of the estate; that the goods belonged to her, and that she had given him authority to sell the same. There is no evidence to contradict this statement. Three sons of Mrs. Friedman were present at, and participated in, the sale of these goods. They

had possession of them, and all three of the sons testified on behalf of the defendants. We do not find a scintilla of evidence to the effect that anyone representing the estate of the deceased Friedman, or his widow, has ever disputed the right and authority of the three sons to make the sale in the manner in which it was made or has ever asserted any claim to the property since the sale was effected. It appears that the note in question was made payable, by mutual consent, to David J. Friedman, and that he endorsed the same in blank and turned it over to his brother Joseph, who delivered it to Tansey before the maturity thereof in consideration of an indebtedness to Tansey aggregating approximately $900. The evidence shows, without contradiction, that this latter transaction was entirely outside of, and having no connection with, the partnership in fire insurance matters then existing between Tansey and Joseph Friedman. We are unable to find any evidence tending to prove that Tansey had any knowledge, at or prior to the time the note was delivered to him, of the alleged guaranty by the Friedmans, or any evidence of bad faith on Tansey's part in taking the note in payment for moneys advanced to the Friedmans and debts due from them to him. In this condition of the record, we think the exceptions to the findings of the master regarding Tansey's ownership of the note and right to collect the amount thereof were properly sustained. It follows that he was entitled to the relief prayed by his cross-bill.

This conclusion disposes of the objections urged to that part of the decree which dismisses the original bill, and the amendments thereto, for want of equity. We think, however, the dismissal was proper for other reasons. It clearly appears from the evidence that the only defense, legal or equitable, which Sam Barnett could have made to the note if suit had been brought thereon by the payee, David J. Friedman, is the alleged

breach of warranty as to the weight of the diamonds sold. Whether any such warranty was made at the time of the sale is a question of fact upon which the evidence is very close and sharply conflicting. Of those who were present at the sale, three persons testified that such a warranty was made, and three others testified to the contrary. To support the theory of the complainants, evidence was introduced before the master as to the existence of a custom among dealers in diamonds and diamond brokers to buy and sell diamonds which are set in clusters upon a guarantee as to the weight, because of the difficulty in such cases of accurately ascertaining the weight without removing the stones from their settings. But there is no evidence tending to show that the Friedmans had any knowledge of such a custom, or sold the jewelry with reference to any such custom. They were neither diamond brokers nor dealers in diamonds. The evidence shows that Sam Barnett is such a dealer and is considered an expert, and that before the bargain was made he, with the assistance of two other experts, made an examination of the diamonds and jewelry in question, at the place of business of another dealer in diamonds, and their examination covered a period of seven or eight hours time. If, as Barnett states in his sworn bill of complaint, he believed the Friedmans were financially irresponsible, it is very improbable that he purchased the jewelry in reliance upon any guaranty by them. We think the facts and circumstances in evidence tend to corroborate the theory of the defendants rather than that of the complainants, and that the complainants failed to prove the alleged warranty and a breach of the same. This being true, there was no error in dismissing the bill for want of equity.

The decree of the Circuit Court will therefore be affirmed.

AFFIRMED.

402 - 18869.

185 I.A. 220

JOHN F. DEVINE, Administrator EDWARD S. JOHNSON, Deceased, Appellant,	) APPEAL FROM
vs.	) SUPERIOR COURT
CHICAGO CITY RAILWAY CO., Appellee.	) COOK COUNTY.

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

This is a suit brought under the statute for wrongfully causing the death of the plaintiff's intestate. At the close of the plaintiff's evidence a motion to instruct the jury to find the defendant not guilty was made and overruled. The same motion was repeated at the close of all the evidence and was then granted, and a verdict of not guilty was returned as directed by the court.

In Libby, et al. v. Cook, 222 Ill. 206, it was held that there is but one rule to be applied to motions to direct a verdict, whether the motion is made at the close of the plaintiff's evidence or at the close of all the evidence; that in either case, if there is no evidence tending to prove the material averments of the declaration, the jury should be directed to return a verdict for the defendant; but if there is any evidence, - beyond a mere scintilla of evidence - from which, if it stood alone, the jury could, without acting unreasonably in the eye of the law, find that all the material averments of the declaration has been proved, then the cause should be submitted to a jury. As a consequence of this principle, it is further there held that if, in such case, the trial judge is of the opinion that in case a verdict is returned for the plaintiff it must be set aside for want of any evidence in the record to

sustain it, a verdict should be directed; but, if he is of the opinion that there is evidence in the record which, standing alone, is sufficient to sustain a verdict for the plaintiff, then the motion should be denied, even though such a verdict, if returned, must be afterwards set aside because against the manifest weight of the evidence. "To hold otherwise is to deny to plaintiff the right of trial by jury", said the court in that case.

Tested by the rule thus declared, the question arising upon this appeal is whether there is any evidence in the record which, standing alone, is sufficient to sustain a verdict for the plaintiff. In applying this test the evidence on behalf of the plaintiff must be taken as true, together with all legitimate inferences which may be drawn therefrom in favor of the plaintiff. Hewes v. C. & E.I. R.R. Co., 217 Ill. 500. It appears from the evidence that the accident occurred about 6:15 P.M., on the evening of October 27, 1909, on North Clark Street at, or near, the north cross-walk of Thome Avenue, in Chicago. The deceased was then about nineteen years old, was a brick-layer's apprentice, in good health, with good hearing and eyesight, and lived with his parents in Thome avenue east of Clark street. On his way home from his work, he and a fellow workman named Collender, walked south on the west side of Clark street to the corner of Thome avenue. There they stood a minute or two, the deceased intending to go east from that point to his home on Thome avenue and Collender intending to take a car and ride south to his home. According to two of the witnesses, it was dark at that time, though there was an electric street lamp on the southwest corner. Collender testified that he noticed that several cars were approaching from the south on the east track at intervals of several hundred feet and were going "pretty fast". All these cars were lighted. A short time after reaching the corner of Thome avenue, Collender hailed a street car which was going south on the west

track in Clark street. The car stopped with its rear platform just south of the north cross-walk of Thome avenue. Collender boarded the car and it went on. The deceased passed behind the car, walking east on the cross-walk. As he stepped from behind the southbound car he was struck by the northwest corner of a car going north on the east track. Two witnesses, who were approaching Clark street from the west on the south side of Thome avenue, saw the deceased hit by the car. They testified that just before he was hit, he was walking east at an ordinary gait; that the car which hit him came up from the south at a "high rate of speed", and did not stop until it reached a point 100 feet, or more, north of the place of the accident; that they heard the "rumble" of the car, but heard no bell sounded.

It is not contended that this evidence, considered alone, does not make out a prima facie case of negligence on the part of defendant. The contention is that it wholly fails to show the exercise of due care on the part of the plaintiff's intestate. Whether the evidence tends to prove such care is a question of law, which a court can determine adversely to the plaintiff (upon a motion to direct a verdict) only when no other conclusion can reasonably be drawn from the evidence favorable to the plaintiff. (Stack v. E. St. Louis Ry. Co., 245 Ill. 308). It has repeatedly been held that the mere failure of a person to stop, look and listen as he approaches a railroad crossing is not necessarily negligence on his part, as a matter of law, and whether such failure is negligence in fact depends upon the facts and circumstances surrounding the accident. (Henry v. C.C.C.&St. L. Ry. Co., 236 Ill. 219; Bukeman v. C.C.C.&St. L. Ry. Co., 237 id. 104; Winn, v. C.C.C.&St. L. Ry. Co., 239 id. 152; Rosenthal v. C.&A. R.R. Co., 255 Ill. 552.) "Courts can lay down no precise rule of action to be observed by a man who, passing behind a street car, finds himself suddenly confronted, without warning, by a rapidly moving car

or other vehicle. The only requirement of the law is that the conduct of the person involved shall be consistent with what a man of ordinary prudence would do under like circumstances." (Stack v. E. St. L. Ry. Co., supra.) The plaintiff's intestate was rightfully on a public crossing, and it was after dark. There is some evidence tending to show that his view to the south was obstructed by the southbound car, both when he started to cross and while crossing the first track. If he looked south, the lights from the southbound car were directly before his eyes, and might easily have confused him. He had a right to presume, and to rely to some extent, at least, upon the presumption that defendant, in operating its northbound car past another car stopped to receive passengers, would not approach without warning. (Stack v. E. St. L. Ry. Co., supra; Schaedel v. Chicago Railways Co., No. 18020 of this court.) We do not think it can be said, after a consideration of these facts and circumstances, that no other conclusion than one of contributory negligence can reasonably be drawn; and therefore we are of the opinion that the court erred in giving the peremptory instruction.

The judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

413 - 18880.

185 I.A. 221

NATIONAL LIFE INSURANCE COMPANY OF THE UNITED STATES OF AMERICA, Appellee,	APPEAL FROM
vs.	MUNICIPAL COURT
THE TITLE GUARANTY & SURETY COMPANY, Appellant.	OF CHICAGO.

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

Appellee recovered a judgment in the Municipal Court against appellant for $2258.41, in an action of the first class, brought upon "a fidelity bond", in which appellant agreed to reimburse appellee for "all loss directly occasioned by larceny or embezzlement" on the part of one Burt H. Hopkins, a general agent of appellee, in connection with the duties of his office or position "as the same have been stated in writing by the employer to the company."

It is urged that the evidence fails to show that the loss claimed by appellee was occasioned by the larceny or embezzlement of Hopkins, "in connection with the duties of his office or position." It is insisted that the evidence shows that at the time the fidelity bond was issued, there was a written contract between Hopkins and appellee, specifically defining his duties as general agent, that the collection of premiums other than "first year's premiums" was not within his duties as so defined, and that the only loss proved was the amount of renewal premiums which Hopkins collected and failed to turn over to appellee. It appears from the evidence that when Hopkins made application to the surety company for the fidelity bond, that company requested appellee to answer a list of questions relating to the subject matter of his application

and that appellee answered such questions with the stipulation that "the above answers are to be taken as conditions precedent and as basis of the said bond applied for." Among such questions and answers are the following:

> "4 (a) How long have you known the applicant? About two months. (c) How long has he been in your employ? Contract dated 6-1 -1910.
>
> 6. (a) What will be the title of applicant's position? General Agent. (b) Explain fully his duties in connection therewith. Collecting premiums, appointing agents and soliciting."

The evidence shows, without contradiction, that after the bond was given, Hopkins was permitted to and did collect premiums other than first year's premiums. There is also some evidence to the effect that this was done in pursuance of an oral agreement entered into after the contract of June 15, 1910 was executed. However this may be, there is no evidence tending to prove that appellant had any knowledge of the provisions of the contract of June 15, 1910, at the time the bond was executed, or that it relied upon that contract as limiting in any manner the statement of appellee in response to the inquiry of appellant, that Hopkins' duties included "collecting premiums". This being true, we are not impressed with the view that the slight reference to the "contract dated 6-15-1910," in the answer quoted above, was intended to qualify or explain the general statement as to the scope of Hopkins' duties. If, however, that view be conceded to be correct, then it manifestly follows that the whole contract of June 15, 1910, must be considered in order to ascertain the extent of Hopkins' duties and authority. The eighth clause of that contract contains the following provision:

> "The General Agent shall not receive any moneys due or to become due to the Company unless authorized in writing, or in exchange for conditional receipts to be furnished by the Company, or on policies or renewal receipts signed by the President, Vice-President or Secretary, sent to him for collection."

This clause of the contract does not forbid the collection by Hopkins of renewal premiums. On the contrary, it clearly contemplates that Hopkins shall collect such premiums, provided official receipts for the same be first sent to him for collection; and this seems to have been the fact as to all the moneys for which the judgment in this case was rendered. Appellee's assistant secretary testified that in May, 1911, he went to Hopkins' office in Memphis to audit Hopkins' accounts; that the "home office" of appellee furnished the secretary with a statement "to check up with," which contained a list of the "outstanding accounts in his (Hopkins') hands for collection"; that by checking this list with the receipts found in Hopkins' possession, and with Hopkins' memoranda showing what had been done with the other receipts which had been sent to him for collection, a shortage of $899.33 was discovered, and that amount was at once paid over by Hopkins. The secretary further testified that the reason he did not then discover the additional shortage of $2258.41 was that Hopkins exhibited memoranda purporting to show that the other renewal receipts which had been sent to him for collection "were then in the hands of various banks for collection and not yet collected." Appellee afterward learned that this statement of Hopkins was not true in point of fact, the fact being that he had collected at that time nearly all of the items covered by such other renewal receipts. In collecting these premiums, he was acting directly within the duties imposed, and the authority conferred, upon him by the eighth clause of the June contract, regardless of any subsequent oral agreement.

It is next urged that the acts shown to have been done by Hopkins, which occasioned loss to appellee, do not amount to larceny or embezzlement, because, it is said, no felonious intent on Hopkins' part was shown. It appears from

the evidence that when appellee's secretary checked over Hopkins' accounts and receipts and ascertained that Hopkins owed appellee $699.33, Hopkins stated that this was all he had collected up to that time. Shortly after this first investigation, Hopkins admitted in writing the collection of sundry additional items, amounting to over $350, and again stated that this covered all of his collections up to that time. Notwithstanding these statements, it speedily developed that he had collected and failed to account for nearly $2000 more. We think these statements and facts are incompatible with any reasonable theory of innocence on the part of Hopkins, and that therefore the trial court rightly found that the evidence proved Hopkins guilty of embezzlement.

It is next claimed that appellant was released from liability because of the alleged fact that appellee granted to Hopkins an extension of time within which to pay the amount of his defalcation. We do not think the evidence supports this theory of the case. It is true that appellee took from Hopkins an instrument in the nature of a chattel mortgage as security for the repayment of the amount embezzled by him. That instrument, however, does not fix any time for payment. Hopkins' wife testified that she refused to sign the instrument until after one of the agents of appellee had stated that he would give Hopkins six months' time in which to pay. The agent named by her positively denies having made any such statement. There is no proof that any new consideration was paid for the chattel mortgage. We think the trial court was justified in finding that no such extension was granted by appellee as was claimed. Whether such an extension if proved, would have the effect of releasing appellant, is a question which it is unnecessary for us to discuss or decide in view of this conclusion as to the facts.

Finally, it is insisted that appellant was released from liability because of the alleged fact that Hopkins' duties were materially increased without the consent of appellant during the period covered by the fidelity bond. If the liability of appellant depended upon the alleged oral agreement brought out in rebuttal, there might be force in the contention. We have already held, however, that the original contract of Hopkins' contemplated the collection by him of the items which he embezzled.

Finding no reversible error in the record, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

426 - 18,893.

185 I.A. 224

MARGARET B. MARSHALL,
Appellant,

vs.

CHICAGO HERALD COMPANY, a Corporation, and THE CHICAGO RECORD-HERALD, a Corporation,
Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

MR. PRESIDING JUSTICE MITCH

DELIVERED THE OPINION OF THE COURT.

By this appeal it is sought to reverse the judgment of the Circuit Court of Cook County, sustaining a general demurrer to a declaration in a libel suit. In the brief and argument of appellant's counsel it is stated that "the only question involved in this appeal is whether or not the words of the publication in question are reasonably or fairly susceptible of any defamatory meaning as respects the plaintiff in her occupation or business." Defendants' counsel discuss the further question as to whether the publication complained of was privileged, but, in the view we take of the case, it will be unnecessary to consider that question.

The article complained of is as follows:

"WOMAN LENDERS UP.

Two Officials of Salary Loan Concerns Are Questioned by Judge Landis.

ONE ACCUSED BY FIREMAN.

Two women officials of salary loan concerns were in the limelight in court proceedings yesterday.

Mrs. L. G. Smith of 5326 Calumet avenue, who holds power of attorney in the Federal Loan Company and a New York concern, was severely questioned by Judge K. M. Landis as to the business of the companies.

Mrs. M. B. Marshall, who has offices in the Commercial National Bank Building, became the center

of an investigation when Stephen Keating, a fireman belonging to engine company No. 32 testified in Municipal Judge Goodnow's court that he was unable to pay $40 a month alimony to his wife because of the grasp Mrs. Marshall had on his pay check.

SUSPENDED FROM PLACE.

Keating testified that he had borrowed $100 from Mrs. Marshall last fall with the understanding that he was to pay back $213 and also receive an insurance policy. He said that she refused to tell him how much he had already paid and that in January when he refused to make the regular payment he was suspended from the fire department for three days at the instance of Mrs. Marshall.

Judge Goodrow withheld a decision in Keating's case until an investigation could be made as to what he owes the woman loan agent.

Mrs. Smith, the other agent, gave herself up yesterday after being searched for for two weeks by bailiffs of the District Court. She was wanted in connection with the investigation being conducted into the affairs of Luman H. French, owner of the Federal Loan Company and a number of similar concerns.

'I knew they were looking for me, but I was timid about coming into court,' Mrs. Smith explained to Judge Landis, when asked why she had gone to Unity, N. Y., when she knew the officers were searching for her.

CALLS FRENCH OLD FRIEND.

Mrs. Smith looked and talked like anything but a grasping loan agent. She is a little woman, 60 years old, and says she is a dressmaker. She said that she had known French since he was a boy and that she had invested $500 in his business and had given him the right to use her name in connection with the affairs of the loan companies.

'I didn't know my name was being used in connection with a New York concern, or exactly what the business was,' Mrs. Smith said in answer to Judge Landis' questions.

In direct contradiction to this testimony two documents bearing her signature were offered in evidence. One granted the use of Mrs. Smith's name in connection with the New York concern and the other gave like powers in connection with the Chicago company.

Mrs. Smith was released on her own recognizance until March 21, when French will be given an opportunity to show Judge Landis why he should not be punished for giving perjured testimony."

By way of inducement, the declaration avers that before and at the time of the publication of the foregoing article in the defendants' newspaper, the plaintiff was engaged in the business of writing life insurance and also making loans of money to divers persons, "taking as security therefor assignments of life insurance policies and other securities", which business

she conducted with great profit in a suite of offices in the Commercial National Bank Building, Chicago; that before said publication a certain other newspaper, published in Chicago, had published numerous articles concerning certain individuals engaged in the "Salary Loan business", depicting therein "the dishonest, fraudulent and cruel tactics employed and used by the said individuals" to extort large sums of money from good and worthy citizens without giving them anything in return therefor; that through the publication of such articles public interest was aroused against those individuals, who were commonly called "Loan Sharks", and certain of said so-called "Loan Sharks" had been summoned before Judge Kenesaw M. Landis, in the District Court of the United States, and subjected by him to severe criticism and penalties; whereby, it is averred, the good and worthy citizens of this State came to look upon persons known as "Loan Sharks", and upon the business of those engaged in the "Salary Loan" business, and upon all things or persons connected with said individuals or their said business "with hatred, disgust and contempt."

The innuendoes contained in the declaration charge that by the headlines of the article in question, the defendants intended to say that the plaintiff "had been accused in a proceeding into which the plaintiff had been summoned before Judge Landis, and charged by a fireman with fraudulent and unfair dealings and dishonest practices in her business relations with said fireman;" that on this account, she had been summoned before Judge Landis and questioned by him concerning her business methods, and thereby "brought into public notice and received scandalous and disagreeable notoriety reflecting upon the character of her business." The innuendoes further allege that by the remainder of the article in question, the defendants intended to charge the plaintiff with

dishonesty and unfairness in her business relations with the fireman, that she used fraudulent and extortionate means to secure money from him to which she was not honestly and justly entitled, and that Judge Goodnow had excused the fireman from paying alimony to his wife because of the plaintiff's unfair and oppressive dealings with him.

In McLaughlin v. Fisher, 136 Ill. 111, it was held that it is not permissible in a pleading to enlarge and extend by innuendoes the meaning of alleged slanderous words beyond their natural import, "except so far as such enlarged meaning is warranted by prefatory matter set forth in the inducement or colloquium." In that case the court said (p. 117): "Words not in themselves actionable can not be rendered so by an innuendo, without a prefatory averment of extrinsic facts which make them slanderous. (Townsend on Slander, 336.) 'The office of the inducement is to narrate the extrinsic circumstances which, coupled with the language published, affect its construction and render it actionable, when, standing alone and not thus explained, the language would appear not to concern the plaintiff, or, if concerning him, not to affect him injuriously.' (Ibid. 308, and note.)"

In order to ascertain the meaning of a published article, the whole of the article must be considered. Each phrase must be construed in the light of the entire publication. The words are to be taken in their natural and obvious meaning, and in the sense that fairly belongs to them. (Harkness v. Chicago Daily News Co., 102 Ill. App., 162.) The headlines of the article in question must, therefore, be read in connection with the language which follows. When this is done, it plainly appears that all that is there said of and concerning the plaintiff, or her business, is that in a certain proceeding before Judge Goodnow, a

fireman had testified that his reason for being unable to pay alimony to his wife was that the plaintiff "had a grasp on his pay check", that he had agreed to pay the plaintiff $213 in installments in return for a loan of $100 and an insurance policy, and that when he refused to pay one of the installments, she had caused him to be suspended for three days from the fire department. There is nothing in this that can be fairly or reasonably construed as containing a charge of dishonesty or unfairness in the plaintiff's business relations with the fireman, or a charge that she was attempting by fraudulent means to extort from him any money to which she was not justly entitled. The statement in the headline that "Two Officials of Salary Loan Concerns are questioned by Judge Landis" is shown, by the body of the article, not to refer to the plaintiff; and even if it could be construed as referring to her, there is nothing libelous in that statement, standing alone and unexplained. To give the words of the article in question, when standing alone, the meaning charged by the innuendoes would be, in our opinion, to enlarge and extend the natural meaning of the words far beyond their ordinary import.

There remains, then, only the further question whether the defamatory meaning charged by the innuendoes may reasonably and fairly be implied from the publication in question, when the matters of inducement set forth in the declaration are read and considered in connection therewith. If, as we have already held, there is nothing in the article, itself, which can be fairly construed to charge the plaintiff with the practices supposed to be common to "Loan Sharks", - such as dishonesty, fraud and extortion - it would seem to follow that the mere fact that the plaintiff was engaged in the business of loaning money and that another newspaper than the one published by the defendant was

conducting a campaign against "Loan Sharks" would not change the natural meaning of the words published into an implied accusation of fraud, dishonesty or extortion by the plaintiff. For if such a meaning could be fairly implied from the publication of the article in question under such circumstances, then any published statement during, or even long after, such a newspaper campaign, to the effect that a defendant in a divorce case had testified in court that he was unable to pay alimony because he had borrowed money from another who was pressing him for payment, would amount to a libelous charge, by implication, that such other was dishonest, a fraud, and a loan shark.

We conclude, therefore, that the demurrer to the declaration was properly sustained, and the judgment of the Circuit Court is accordingly affirmed.

AFFIRMED.

465 - 13,934.

185 I.A 227

THOMAS FREDERICK, Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT
MRS. AUGUSTUS D. CURTIS, Appellant.	)	COOK COUNTY.

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

Appellee recovered a judgment against appellant in the Circuit Court for $625 for personal injuries sustained in consequence of being run down by appellant's automobile on 47th street, in Chicago. The evidence tends to prove that while the plaintiff, a street car conductor, was operating a switch in the roadway of 47th street by holding up the switch lever to allow his street car to pass through, he was run into and injured by the defendant's automobile. Appellant claims that the verdict is contrary to the weight of the evidence and that the plaintiff was guilty of contributory negligence. These are pure questions of fact, upon which the evidence is conflicting. We have carefully examined the evidence in the light of the contentions of appellant's counsel, and, without discussing the evidence in detail, deem it sufficient to say that, in our opinion, the verdict is not manifestly contrary to the preponderance of the evidence either upon the question of the negligence of the defendant or the question of the care exercised by the plaintiff for his own safety.

As to the alleged failure of the declaration to state a cause of action, we think the declaration is sufficient, after verdict, if not before, under the ruling of this court in Cowen v. Story & Clark Piano Co., 170 Ill. App. 92.

The judgment of the Circuit Court will therefore be affirmed.

AFFIRMED.

498 - 12969.

DANIEL F. BURKE, Appellee,	)	185 I.A. 228 APPEAL FROM
vs.	)	MUNICIPAL COURT
CITY OF CHICAGO, Appellant.	)	OF CHICAGO.

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

The plaintiff, Burke, recovered a judgment against the City of Chicago in the Municipal Court for $1961.42, for interest on seven local improvement bonds of the denomination of One Thousand Dollars each. The bonds were issued in part payment of the contract price of the construction of a sewer in South Forty-Fifth avenue from the Chicago River to West Twelfth street, and were all due on December 31, 1901, with interest thereon at the rate of six per cent. per annum.

The case was tried by the court without a jury upon a written stipulation as to the facts. The stipulation states in substance that when the plaintiff's bonds matured, he demanded payment and the City paid him the interest which was due at that time, but did not then pay the principal "because on said date there was a deficiency in the special assessment fund provided for the payment of the same;" that subsequent to December 31, 1901, the plaintiff made frequent demands for payment and that the City made several payments on account, but that the principal was not paid in full until December 31, 1909, "because there had not been funds in said special assessment fund between the date of maturity and said date of payment available for the payment of the same in full;" "that no interest was paid subsequent to December 31, 1901, and that the total amount of such interest on the unpaid portions of the principal of said bond, computed at the

rate of five per cent. per annum from December 31, 1901, to December 31, 1909, is $1961.42; that when the last payment of principal was made on December 31, 1909, there remained to the credit of said warrant (i.e. the special assessment fund) on the city comptroller's books, the sum of $10.29, after which a "surplus began to accrue" which, on April 22, 1912, amounted to $3086.92; "that at no time from 1901 to 1909 did any money remain to the credit of said warrant in the office of said comptroller without being applied pro rata to the payment of all the bonds issued under said warrant;" that the total amount collected up to April 22, 1912 upon the special assessment levied to defray the cost of the improvement was $593,935.86; that after collecting part of the assessment and prior to December 31, 1897, the City "rebated" or paid back to property owners, before paying the cost of the improvement, $2962.20; that in the assessment proceeding, the City of Chicago was assessed for public benefits $1200, and said assessment was confirmed September 18, 1895, but that the City never paid the amount so assessed for public benefits into the special assessment fund.

The judgment appealed from was entered on June 25, 1912, and sixty days time was then given the City within which to file its bill of exceptions. On July 20, 1912, the City made a motion to vacate the judgment, which motion was denied. As to that motion and the ruling thereon, the only statement in the bill of exceptions which purports to show what evidence, if any, was heard upon the motion, is as follows: "Thereupon the defendant moved the court for leave to file an affidavit in behalf of the City of Chicago, and further moved the court that the judgment heretofore entered against the City of Chicago, in the above entitled cause, be vacated and set aside. Thereupon the court admitted the affidavit of the City but denied the motion to vacate judgment, to which decision of the court in denying said motion the defend-

ant by his counsel then and there excepted". No such affidavit appears in the bill of exceptions.

Appellant's counsel concede that, under the ruling of the Supreme Court in the case of Conway v. The City of Chicago, 237 Ill. 138, the City is liable to the holders of bonds payable out of the special assessment fund in question for the amount of the rebates of $2862.20, paid to property owners before anything was paid on the contract. But they contend upon the authority of the same case, that as to the "uncollected" public benefits of $1200, "the City is not liable to the bondholders in an action of assumpsit, for the reason that this sum of $1200 never came into the hands of the City in cash," and that the only way to compel the payment of public benefits is by a mandamus proceeding. Appellant's counsel further contend that even as to the amounts paid out for rebates the City is only liable to the plaintiff for his pro rata share, with other bondholders, of the amount rebated.

As to the contention last above stated, we are of the opinion that appellant is not in a position to raise the point in this court. There is nothing in the stipulation of facts, or in any part of the record of which this court can take notice, tending to show that there are any bonds outstanding and unpaid other than the plaintiff's bonds, or that any bondholder, other than the plaintiff, has, or claims to have, any interest whatever in the special assessment fund in question. It is true that the bill of exceptions shows that, at the time the motion to vacate the judgment was made in the Municipal Court, "an affidavit" was "admitted", and there appears in the transcript of the record as made up and certified by the clerk of that court, an affidavit of one of the City's attorneys, in which it is stated that the stipulation of facts upon which the judgment was based "was inadequate and did not contain all the facts necessary for

the proper determination of the issues," and that the comptroller's ledger shows that $41,400 of bonds were unpaid at their maturity in 1901, and were not paid in full until December 31, 1909. But this affidavit is not incorporated into the bill of exceptions, nor otherwise identified by any certificate of the trial judge, as the affidavit referred to in the bill of exceptions. It is well settled in this State, that such an affidavit cannot be considered by an adequate court unless it is incorporated into the bill of exceptions. (Yost Manf. Co. v. Alton, 188 Ill. 364; Pardridge v. Morgenthau, 157 Ill. 395.) It is equally well settled that such an affidavit cannot be incorporated into a bill of exceptions by a mere reference thereto. (City of Chicago v. South Park Comrs., 139 Ill. 387, 391; Meissner v. The People, 169 Ill. 530; Kalish v. City of Chicago, 219 Ill. 133.) It follows that the affidavit found in the transcript of the record cannot be considered by this court for any purpose. The burden was not on the plaintiff to prove that there were no other bonds outstanding and unpaid. The burden was on the City to show, if it could or desired to do so, that others had like claims against it amounting to more than the funds available, before it could require the plaintiff to pro rate with other creditors.

Whether the City is liable in assumpsit for the amount of the "uncollected public benefits" of $1200, is a question which does not necessarily arise under the facts of this case. If the claim of appellant's counsel upon this question be conceded, it does not follow that the judgment in this case must be reversed or is erroneous on that account. It appears from the stipulation of facts that at the time the plaintiff's bonds matured, the City should have had in its hands the sum of $2962.20 applicable to the payment of such bonds, but that it had wrongfully paid out that amount in rebates. The City was liable to the plaintiff

for that amount with interest at five per cent. per annum "from the time when appellee became entitled, under his bonds, to demand the payment of these funds to him" (Conway v. City of Chicago, supra.) That is, by the refusal of the City to pay over that amount to the plaintiff upon his demand on December 31, 1901, the City became liable to him in assumpsit for that amount with interest at five per cent. from that date until paid. The plaintiff was also entitled to be paid out of any moneys collected thereafter by the City upon the special assessment. It appears that the latter were paid to him from time to time, as collected, and such payments were applied on account of the principal of his bonds, but that not enough was collected to pay the interest accruing thereon. The liability arising out of the City's wrongful act has never been discharged. It existed when this suit was brought, and was a liability in favor of the plaintiff to the extent that his lawful demand remained unsatisfied. The liability of the City on that account alone exceeded the amount then due and owing to the plaintiff. Hence, whether there was, or might have been, an additional liability arising out of the failure of the City to pay its public benefit assessment, is immaterial in this case.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

374 - 18841.

185 I.A. 231

JOHN STORER and LAWRENCE P. CONOVER, Appellees,	)	APPEAL FROM
	)	SUPERIOR COURT
vs.	)	COOK COUNTY.
RICHARD A. MORLEY, Appellant.	)	

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On January 19, 1909, the appellees, a physician and an attorney at law respectively, commenced this action in assumpsit, in the superior court of Cook county, to recover damages for the breach of a written contract, dated March 21, 1908, against Richard A. Morley, appellant and defendant below, a dealer and speculator in New Mexico lands. Upon the trial before a jury a verdict for $10,000 in favor of the plaintiffs below was returned on May 26, 1911, and, after plaintiffs had remitted the sum of $4,000 and defendant's motions for a new trial and in arrest of judgment had been overruled, judgment was entered against the defendant February 10, 1912, for $6,000, which judgment the defendant by this appeal seeks to reverse.

The facts of the case are substantially as follows: On March 2, 1908, the defendant, Morley, entered into a written contract with the trustees of the Maxwell Land Grant for the purchase from them of 20,000 acres of land, more or less, situated in Colfax county, New Mexico. The first payment of $10,000 to be made by Morley on said contract became due, and Morley applied to the plaintiffs, Dr. Storer and Conover, for financial assistance, and thereupon after some negotiations the written contract sued on, dated March 21, 1908, was signed and sealed by the defendant, as party of the first part, and by each of the plaintiffs,

as parties of the second part. The contract is in part as follows:

"WHEREAS, said party of the first part has entered into a contract, dated March 2, 1908, with the trustees of the Maxwell Land Grant for the purchase of a certain tract of land therein more particularly described, and situate in Colfax County, New Mexico, * * containing 20,000 acres, more or less, and

WHEREAS, the first payment on said contract in the sum of $10,000 has become due, and said parties of the second part, in consideration of the conveyance to them of a portion of said land as hereinafter more particularly described, have agreed to make such payment at the time and in the manner hereinafter described.

NOW, THEREFORE, it is mutually understood and agreed as follows:

First. Said parties of the second part agree to pay to the said trustees of the Maxwell Land Grant upon said contract between said trustees and said party of the first part the sum of $10,000, to-wit: $1,000 at the time of the execution and delivery of this contract, and the balance of $9,000 on or before April 10th, 1908, such last payment to be made by depositing said sum with the Commercial National Bank of Chicago, to the credit of the San Miguel National Bank of East Las Vegas, and notifying said last named bank of such deposit.

Second. Said party of the first part in consideration of said payments hereby agrees to convey or cause to be conveyed to said parties of the second part on or before four months from the date hereof, * * 2,000 acres of the land described in the contract between the said party of the first part and said trustees, * * said 2,000 acres to be selected by said parties of the second part within 20 days after notice in writing from said party of the first part notifying said parties of the second part to make such selection.

Fourth. Said parties of the second part may make a selection of said land at any time hereafter, * *.

Sixth. Said party of the first part hereby further agrees that within six months from the date hereof he will sell the 2,000 acres above described for said parties of the second part at a net price to said parties of the second part of $8 per acre, provided, however, that said parties of the second part may, if they so elect, notify said party of the first part in writing of their desire to withdraw said land from the market, in which case the authority of the said party of the first part to sell said land shall terminate at the end of ten days from the receipt of such notice, and the said party of the first part shall be relieved and discharged of all obligation to sell said land as above set forth or otherwise.

Seventh. It is understood and agreed that any notice herein required to be given may be given by mailing the same, postage prepaid, addressed in the case of the said party of the first part to such party by name at East Las Vegas, New Mexico, or in case the parties of the second part by mailing duplicate notices, one to John Storer, Room 1110, 92 State street, Chicago,

Illinois, and one to Lawrence P. Conover, 804 Tacoma Building, Chicago, Ill.

This contract shall be binding upon and inure to the benefit of the parties hereto, their heirs, executors, administrators and assigns".

Underneath the signatures and seals of the parties to the agreement, as the same was introduced in evidence, appear two instruments in part as follows:

"The lands selected under and as provided in the foregoing agreement are:

All of Sections 8 and 9 and such portion of Section 7 as lies east of * *, and so much of the south portion of Section 4 necessary to make up the total area of 2,000 acres. All of this land located in Township 29 North, Range 23 East. * *.

(Signed) Richard A. Morley.
(Signed) John Storer.
(Signed) Lawrence P. Conover.

The undersigned Trustees of the Maxwell Land Grant having received from John Storer and Lawrence P. Conover, parties to the foregoing agreement, the sum of $1,000 on account of the contract between the undersigned and Richard A. Morley, dated March 2, A.D. 1908, of certain lands in Colfax County containing twenty thousand (20,000) acres, more or less, hereby extend the time in which the balance of $9,000 on the first payment under said contract shall be made until April 10, 1908, and hereby agree that in case said balance * * is paid on or before said date by said John Storer and Lawrence P. Conover, or either of them, and in case said Richard A. Morley shall default in making the second payment of $15,000 due under said contract between the undersigned and said Morley, the undersigned will either return said $10,000 to said John Storer and Lawrence P. Conover or convey to them by a good and sufficient deed free and clear from all incumbrances the 2,000 acres of land to be selected by them under the terms of the foregoing contract.

In testimony whereof, the undersigned have hereunto set their hands and seals this 21st day of March, A.D. 1908.

(Signed) J. Van Houten (Seal)
Vice Pres. for Trustees of the Maxwell Grant.

(Seal of the Board of Trustees of the Maxwell Land Grant.)

J. M. Cunningham,
Sec'y."

On the back of said contract and said two instruments accompanying the same, appears the indorsement of the county recorder of Colfax county, New Mexico, to the effect that "this instrument in writing" was filed for record on August 7, 1908, and duly recorded.

[illegible]

It appears from the evidence that the contract was executed in Las Vegas, New Mexico; that immediately after its execution the parties personally inspected the land; that plaintiffs at once made a selection of the 2,000 acres as above set forth; and that plaintiffs paid the $10,000, within the time and in the manner provided in the contract, to the trustees of the Maxwell Land Grant, to-wit: $1,000 at the time of the execution and delivery of the contract, and the further sum of $9,000, on April 9, 1908, by depositing the same with the Commercial Bank of Chicago, to the credit of the San Miguel Bank of East Vegas, and notifying the latter bank of such deposit. Plaintiffs thus fully performed all the covenants and agreements of the contract to be performed on their part and became thereby the equitable owners of said 2,000 acres of land so selected by them, and it thereupon became the duty of the defendant, under the terms of the contract, to "convey or cause to be conveyed" to the plaintiffs on or before July 21, 1908, said 2,000 acres of land, and also to sell for the plaintiffs, on or before September 21, 1908, said 2,000 acres of land at a net price to the plaintiffs of $8 per acre, unless the plaintiffs, at their election, should in writing notify the defendant of their desire "to withdraw said land from the market", in which event the defendant would still have authority to sell said land at said net price to the plaintiffs for a period of 10 days after the receipt by him of such notice, but he would be "relieved and discharged of all obligation to sell said land". The plaintiffs did not at any time elect to withdraw the land from the market, and they were at all times ready and willing to convey the land to any purchaser at said net price that the defendant might produce, but the defendant failed to produce such a purchaser and failed to sell the land at said net price.

It further appears from the evidence that within the time fixed by the contract for a conveyance of the land to plaintiffs, to-wit, on July 13, 1908, Conover wrote Morley, calling his attention to the fact that plaintiffs were entitled to a deed of the land by July 21, 1908, requesting that the deed be made to run to Conover alone instead of to Dr. Storer and Conover, and saying that Dr. Storer would send authority for this action, further saying that he (Conover) had hoped that by this time Morley would have sold the land, and requesting that, if the land was not sold by the 21st, that it by definitely located by a survey and deed made to Conover. On August 5th, Dr. Storer, by written assignment, assigned his half interest in the land to Conover, and directed Morley to convey the land to Conover. On July 30th Dr. Storer wrote Morley saying that he had been hoping for several weeks to hear from Morley in relation to "our land deal"; that Morley had not replied to his letter written some weeks past; that under the contract "we were to receive a deed of the land July 20th, now ten days past", and that "we had hoped the land would be sold ere this", and requesting an early reply. On August 8th, Morley replied that on July 3rd he had ordered the Land Grant board to make out a deed of the land, that he had been busy and away most of the time and had supposed the deed had passed long since, that the weather had been very dry up to July 1st, that neither he nor any of the land men had brought any buyers in, but that he was listing the land and "hoped to sell it before a great while". During the months from August, 1908, to January, 1909, plaintiffs made endeavors through their local attorney in New Mexico to obtain a deed to the land, and Morley, by letters written on August 25th, September 5th, December 18th, 1908, and January 4th, 1909, in which he made no objection to the deed being taken in Conover's name, kept repeating that the deed would soon be delivered, etc. It

appears that the trustees of the Land Grant Co. objected to the deed running to Conover alone, and finally said trustees executed a warranty deed to the 2,000 acres, running to Dr. Storer and Conover jointly, dated December 12, 1908, and acknowledged January 8, 1909. This deed was accepted by the plaintiff when delivered and it was recorded January 26, 1909. A deed to the land was never refused at any time by the plaintiffs or either of them. Prior to the beginning of this suit, to-wit, on January 16, 1909, Conover. by written assignment, reassigned the half interest in the land back to Dr. Storer, which he had received by virtue of the latter's assignment to him, August 5, 1908, above mentioned.

It further appears that on September 26, 1908, Conover wrote Morley to the effect that under the terms of said contract of March 21, 1908, Morley had guaranteed to Conover and Storer a profit of $8 per acre within 6 months from the date of the contract, and that the 6 months had now elapsed, and requesting that Morley arrange to take care of the matter at an early date. On October 12th, Dr. Storer wrote Morley expressing surprise that Morley had not written, etc. On October 22nd, Morley wrote separate letters to Conover and Storer, making excuses for not having sold the land, and saying in the letter to Conover "Give me time, * * and I will sell that land".

It is contended by counsel for defendant that under the terms of the contract the defendant was merely an agent of the plaintiffs, <u>authorized</u> to sell the 2,000 acres of land, but was under no <u>obligation</u> to find a purchaser for the land at said net price. We cannot agree with the contention. We think that by the sixth paragraph of the contract it clearly appears that the defendant was under the obligation of selling the land within six months from the date of the contract, and at a net price to plaintiffs of $8 per acre. And this is seemingly the

construction which both parties in their correspondence put upon the contract. And we think that the defendant, having failed to comply with his obligation to sell said land at said net price, became liable in damages to the plaintiffs. (Plumb v. Campbell, 129 Ill. 101; Dunn v. Mackey, 80 Cal. 104; Sprague v. Hart, 11 Cal. App. 782.)

And we do not think there is any merit in the contention of counsel for defendant that plaintiffs waived their right of action by the acceptance of a deed from the trustees of the Land Grant Co. after the time within which, under the terms of the contract, the defendant was to sell the land. By the terms of the contract the defendant agreed (a) to convey or cause to be conveyed to the plaintiffs the said 2,000 acres of land on or before four months from the date of the contract, and (b) to sell said land for the plaintiffs within six months from the date of the contract at a net price of $8 per acre. The plaintiffs were not bound to rescind the contract because of defendant's delay in causing the land to be conveyed to plaintiffs, and they did not do so, but on the contrary elected to keep the contract alive and to hold the defendant to its terms. And the fact that the defendant did not perform within the stipulated time one of the two acts agreed to be performed by him, should not operate to excuse him from performing the other act.

And we do not think that it was necessary for the plaintiffs to have tendered to defendant a deed of the land before commencing the present action. (Clark v. Weis, 87 Ill. 438, 441; Manistee Lumber Co. v. Union Nat. Bank, 143 Ill. 490, 502; Cagood v. Skinner, 211 Ill. 229.)

We deem it unnecessary to here discuss the many other points raised by counsel for defendant in his brief. Suffice it to say that we do not find any reversible error in the record. The judgment of the Superior court is accordingly affirmed.

AFFIRMED.

398 - 18865.

185 I.A. 235

MARGARET BURNS McHUGH, Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT
HARRY B. RUBENSTEIN, Appellant.	)	COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Appellant, defendant below, seeks by this appeal to reverse a judgment for $500 rendered against him and in favor of appellee, plaintiff below, in an action for damages for personal injuries. The case was tried before a jury who returned a verdict in favor of plaintiff for $500.

The facts of the case are substantially as follows: About five o'clock in the afternoon, April 8, 1911, plaintiff and her sister-in-law, Mrs. Hilda Burns, were walking in a southerly direction on Milwaukee avenue, Chicago, looking for a flat to rent. When they reached the store, then owned and occupied by defendant and known as No. 1907 Milwaukee avenue, they noticed on the front of the store a sign reading "Flat to Rent, Inquire Within". Above the store were two additional stories which were arranged to be occupied as flats, and on one side of one of the windows of the store was a door to a hall leading from the street to the stairways to the flats above. Plaintiff entered the store for the purpose of making inquiries as to the flat for rent, Mrs. Burns remaining on the sidewalk outside. Plaintiff saw no person in the store, and thinking that some one might be back of the partition, walked towards the rear of the store, calling out as she advanced that she desired some one to wait upon her. Before she reached the partition she fell through an unguarded opening or stairway into the basement below and suffered the injuries complained of. A boy had

been left in charge of the store, but at the time of the accident was out on the street. The defendant and several other witnesses for him testified that the "For Rent" sign was on the hall door. Plaintiff and Mrs. Burns, however, testified that the sign was either on the door of the store or on one of the two front windows of the store.

Under the facts as disclosed by this record, we do not think that the trial court erred, as counsel for the defendant contends, in refusing to instruct the jury to find the defendant not guilty. We think that plaintiff was upon the premises of the defendant not as a mere licensee but upon the invitation of the defendant. (Pauckner v. Waken, 231 Ill. 276; Graney v. Union Stock Yards Co., 235 Ill. 522; Purtell v. Philadelphia Coal Co., 256 Ill. 110, 114.)

And whether or not the defendant was guilty of the negligence charged or the plaintiff guilty of contributory negligence were questions for the jury under all the evidence to decide.

And we cannot say that the verdict is against the weight of the evidence. The judgment is affirmed.

AFFIRMED.

401 - 13888.

185 I.A. 237

THE PARKER-WASHINGTON COMPANY, Appellant,	)	APPEAL FROM
vs.	)	MUNICIPAL COURT
CITY OF CHICAGO, Appellee.	)	OF CHICAGO.

STATEMENT OF THE CASE. This is an action brought by The Parker-Washington Company, a corporation, plaintiff below, to recover from the City of Chicago certain balances claimed to be due on two contracts. One of these contracts provided for the construction by plaintiff of the pump-pit, suction-well and foundations for the engine house of the Roseland Pumping Station, located at 104th street and Stewart avenue in the City of Chicago. This contract will be referred to hereinafter as the "engine room contract". The other contract provided for the construction by plaintiff of the foundations for the boiler room, auxiliary buildings and chimney, immediately adjoining said engine house. This contract will be referred to hereinafter as the "boiler room contract". The engine room contract was dated November 5, 1908, and the time as originally fixed for its final completion was July 1, 1909. This time was, however, extended at plaintiff's request to January 15, 1910, but the work was not fully completed until February 28, 1910, or 44 days after the date fixed for completion as extended. The boiler room contract was dated September 10, 1908, and the time fixed for its final completion was December 22, 1909. This time was not extended and it does not appear that plaintiff at any time prior to December 22, 1909, requested an extension. The work was not fully completed until March 5, 1910, or 73 days after the date fixed for completion. Plaintiff was to receive as compensation for performing the engine room contract a sum in

excess of $50,000, and for performing the boiler room contract a sum in excess of $12,000, and partial payments were from time to time made to plaintiff on both contracts as the work progressed on estimates issued. When final payment was made the City claimed the right under a provision contained in both contracts to deduct, and did deduct, as liquidated damages, the sum of $50 for each day that the several contracts remained uncompleted after the dates fixed for completion. Accordingly, the City retained on the engine room contract the sum of $2,200 (44 days @ $50) and on the boiler room contract the sum of $3,650 (73 days @ $50), and these are the balances which plaintiff seeks in this action to recover. The provision referred to in said contracts is as follows:

> "It is distinctly understood and agreed by the parties hereto that the work to be performed hereunder shall be completed within the time hereinabove fixed for its completion. Inasmuch as failure to complete the same within the time herein fixed will work an injury to the City of Chicago and as damages arising from such failure cannot be calculated with any degree of certainty, it is hereby agreed that, if such work is not fully completed within the time fixed herein, there shall be deducted from the contract price and retained by said City as its ascertained and liquidated damages the sum of Fifty Dollars ($50.00) for each and every day passing after the date fixed for the completion until said work is fully completed as specified."

The case was tried before the court without a jury, resulting in a finding in favor of the plaintiff as to the balance due on the engine room contract and assessing plaintiff's damages at the sum of $2,465.80, being said amount of $2,200 so retained by the City together with interest thereon, upon which finding judgment was entered against the City. It is stated in substance by the respective counsel in their briefs here filed, that the trial court held that the above quoted clause contained in both contracts was to be construed as a provision for liquidated damages and not as a penalty, and that the court accordingly found that the City was justified in retaining the said sum of $3,650 on the boiler room contract, and that the court further found that the City had itself con-

tributed to the delay in the completion of the engine room contract to such an extent as not to justify the deduction by it of any amount as damages. Plaintiff appealed from the judgment to this court and here contends that the trial court erred in refusing to enter judgment in its favor in such sum as would include the said amount retained by the City on the boiler room contract together with interest, and principally on the ground that the evidence tends to show that neither the City nor the inhabitants thereof were in any way damaged by the fact that the said contracts were not completed within the time fixed. The City has here assigned cross-errors and contends that the finding of the trial court that the City was not justified in retaining the said sum of $2,200 for the reason mentioned is not supported by the evidence, and that the court erred in entering judgment against the City in any amount whatsoever.

It appears from the evidence that the City of Chicago, for the purpose of relieving the water shortage in the extreme south and southwest portions of the City and to reinforce the supply for Hyde Park and Englewood, by ordinance passed in 1906, authorized the construction of the Southwest Land & Lake Tunnel system. For construction and contract purposes the proposed tunnel was divided into three sections. Section 1 began at the site of said Roseland Pumping Station, 104th street and Stewart avenue, and extended for a short distance northeasterly to State street and thence north under State street to 73rd street. Section 2 began at 73rd street and extended east under that street to a point near Lake Michigan. Section 3 began at that point and extended in a northeasterly direction a long distance out under the lake to a crib, opposite 88th street. Water was to be brought through this tunnel from the crib to said pumping station and from there was to be distributed to the south and southwest parts of the City. The contract for the construction

of said Section 1 was let to Joseph Hanreddy on April 9, 1906, to be completed October 1, 1908. By order of the City Council this time was extended to October 1, 1909, and the contract was completed April 30, 1909. The contract for the construction of Section 2 was let to the plaintiff company on July 2, 1906. By order of the City Council the time fixed for its completion was extended to December 1, 1908, and the contract was completed October 20, 1908. The contract for the construction of Section 3 was let to George W. Jackson Company about February 19, 1907. By orders of the City Council the time fixed for its completion was extended to November 29, 1908, and again extended to November 1, 1910, but the contract was not finally completed until about December 21, 1911, when for the first time the water reached the Roseland Pumping Station. This was over one year and nine months after plaintiff had fully completed both of its contracts on said pumping station. The contract for the construction of the superstructure of said pumping station was let to the Warner Construction Company, on December 6, 1909, to be completed December 21, 1910, and it was finally completed on March 25, 1911. The contract for the manufacture and installation of the pumps to be used at the pumping station was completed and the pumps ready for use about the middle of December, 1911. Everything was in readiness when the water finally came on December 21, 1910, and counsel for plaintiff argue from this that no damage was occasioned to the City or its inhabitants by reason of plaintiff's failure to complete its contracts within the time fixed.

It appears from the testimony of plaintiff's witness, George F. Samuel, that he was an assistant city engineer in the Department of Public Works of the City of Chicago and was in general charge of the construction, as the City's representative, at the pumping station during the time that plaintiff was engaged in the performance of its two contracts. He testified that in

November, 1909, he ordered the plaintiff to delay the building of the south concrete wall of the engine room foundation for the reason that it was necessary for plaintiff at that time, in connection with the boiler room contract, to drive a large number of piles near said south wall, and that if they were driven after said wall was constructed there was great danger of the wall being cracked and deformed, that in his opinion this order, which was obeyed, caused a delay to plaintiff in completing the engine room contract of about thirty working days, and that after said piles had been driven the severe weather and low temperature during the month of December further delayed the completion of said south wall, resulting in the delay in the final completion of the engine room contract. Two other witnesses for plaintiff, employed by plaintiff on the work, testified that in their opinion if the construction of said south wall had not been delayed as aforesaid the engine room contract would have been completed by January 15, 1910, the time fixed for completion.

The court allowed the plaintiff, over the objection of the attorney for the City, to introduce in evidence certain letters, all written after plaintiff had fully completed both contracts. One was a letter of said George F. Samuel written March 15, 1910, to John J. Hanberg, Commissioner of Public Works of said City, at the latter's request for a report. Another was a letter written by said Commissioner on March 24, 1910, to the finance committee of the City Council, in which was enclosed a copy of Samuel's letter above mentioned, and also a copy of a letter from the plaintiff in which plaintiff requested that no penalty be exacted by the City for failure to complete its contracts within the time fixed, and stated the causes for the delay. The Commissioner in this letter asked that the finance committee settle the question before the final payments were made. Another was a letter of said Samuels, dated July 9, 1910,

to the newly appointed Commissioner of Public Works, B. J. Mullaney, reporting to him at the request of said finance committee as to plaintiff's work on said contracts. Another was a letter of said B. J. Mullaney, Commissioner, etc., dated June 30, 1910, addressed to said finance committee, in which the writer stated that in his judgment "these penalties should not be exacted". Another was a letter, dated July 11, 1910, signed by the chairman of said finance committee, and addressed to the Mayor and City Council, in which it was stated that said committee recommended that the City Council pass an order directing the Commissioner of Public Works to enter into an agreement with plaintiff for an extension of the time for completion of the engine room contract "to February 28, 1910", and for an extension of the time for completion of the boiler room contract "to March 5, 1910". It does not appear that the recommendation of the finance committee was in any wau acted upon by the City Council.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It is sometimes a difficult matter to determine whether a contract provision like the one here in question shall be construed as a provision for liquidated damages or only as a penalty. "The primary and most essential principle of construction is to ascertain the meaning and intent of the parties, by reference to the contract itself, the subject matter thereof, the terms used to express the intent, and the circumstances under which the contract was made." (Ludlow Valve Co. v. City of Chicago, 181 Ill. App. 388, 392; Peine v. Weber, 47 Ill. 41, 47.) "The fact that the parties use the words 'liquidated damages' in their agreement does not always determine the question." (Hennessy v. Metzger, 152 Ill. 505, 514.) However, "it will be inferred the parties intended the sum named as liquidated damages where the

damages arising from the breach are uncertain and are not capable of being ascertained by any satisfactory and known rule, or where, from the nature of the case and the tenor of the agreement, it is apparent the damages have already been the subject of actual and fair calculation and adjustment". (Gobble v. Linder, 76 Ill. 157, 159.) In Peine v. Weber, supra, it is said: "The intention of the parties in such, as in all other cases of contract, must govern in its construction. Courts have considered a stipulated sum as a penalty merely, for the reason that, from the whole contract, it appeared such must have been the real meaning of the contracting parties. * * But when such a provision has reference only to uncertain damages, and the case shows serious damage might have been incurred, as in this case, and no fraud has been used in procuring the stipulation to be inserted in the contract, it becomes a matter with which courts cannot interfere, and furnishes the only measure of damages. * * Unless there is good fround for it, a court cannot declare a stipulated sum, which the parties themselves have said shall be the amount of damages, to be a penalty merely." In Poppers v. Meagher, 148 Ill. 192, 205, our Supreme Court, after reviewing several of the Illinois decisions, said: "The rules deducible from these cases may be stated: First, where, by the terms of a contract, a greater sum of money is to be paid upon default in the payment of a lesser sum at a given time, the provision for the payment of the greater sum will be held a penalty; second, where, by the terms of a contract, the damages are not difficult of ascertainment according to the terms of the contract, and the stipulated damages are unconscionable, the stipulated damages will be regarded as a penalty; third, within these two rules parties may agree upon any sum as compensation for a breach of contract." In Davin v. City of Syracuse, 128 N. Y. Supp. 1002, 1005, it is said: "The agreement must be construed in the light of the sur-

rounding circumstances at the time it was made, and not in the light of subsequent events."

These principles apply with peculiar force where the contract is made with a municipality for the construction of a public improvement, or the furnishing of materials therefor, and the parties stipulate in the contract that a failure to complete the contract within the time fixed will work an injury to the municipality, and that the damages to the municipality or the inhabitants thereof for such failure cannot be calculated with any degree of certainty, and that for such failure the municipality may deduct and retain from the contract price, as liquidated damages, a not unconscionable sum for each day that the contract remains uncompleted beyond the date fixed for its completion. (Brooks v. City of Wichita, 114 Fed. Rep. 297; Davin v, City of Syracuse, supra; Ludlow Valve Co. v. City of Chicago, supra.)

And in such a case evidence that the municipality or the inhabitants thereof, as a matter of fact, suffered little or no damage because the contract was not actually completed within the time fixed is not properly admissible. (Wood v. Niagara Falls Paper Co., 121 Fed. Rep. 818; Stephens v. Essex County Park Commission, 143 Fed. Rep. 844, 845; Turner v. City of Fremont, 170 Fed. Rep. 259, 265; Hennessy v. Metzger, supra; Ludlow Valve Co. v. City of Chicago, supra.)

In the present case the testimony, tending to show that the City and the inhabitants thereof were not in fact damaged by the failure of the plaintiff to finish its contracts within the time stipulated or as extended, was objected to by the City and was admitted by the court "subject to the objection". In our opinion the court would have been justified in excluding this testimony on the authority of the cases last above cited. It is evident, however, that the court finally disregarded this

testimony. As to the boiler room contract no claim was made that the City in any manner contributed to the delay in its completion within the time stipulated, and in our opinion the finding of the court as regards this contract was, under the law, justified by the facts appearing in this record.

Counsel for the City in their brief and argument here filed state that they "do not deny that one claiming under a liquidated damage provision must not itself contribute to the delay of the defaulting party". And, as regards the engine room contract, we cannot say that the trial court's finding, that the City contributed to the delay in the completion of this contract within the time as extended to such an extent as not to warrant any deduction by the City from the contract price, is manifestly against the weight of the evidence.

Accordingly, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

422 - 19089.

185 I.A. 249

JULIUS LONDON, Appellee,	)	APPEAL FROM
vs.	)	MUNICIPAL COURT
S. JAFFE, Appellant.	)	OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

S. Jaffe, defendant below, seeks by this appeal to reverse a judgment for $1,834.29 rendered against him and in favor of Julius London, plaintiff below, in the Municipal Court of Chicago upon the verdict of a jury.

The suit was based upon a written assignment, dated October 7, 1911, to the plaintiff, as assignee, of an account due M. Golbus, assignor, from the defendant for the sum of $1,834.29. The defense, as disclosed from defendant's affidavit of merits and as urged upon the trial, was (a) that said assignment was not made in good faith and was without consideration as between the assignor and assignee, and (b) that at the time of the execution of the assignment there were no monies due and owing from the defendant to said Golbus.

The facts are substantially as follows: Plaintiff's assignor, Golbus, on September 27, 1911, sold to the defendant for cash 72 bales of soft wool and 34 bales of cloth, the purchase price being $2954.04. The merchandise was completely delivered to defendant on October 4, 1911, at which time Golbus was indebted to defendant upon a prior open account in the sum of $1,119.75, so that when said merchandise was delivered the defendant owed Golbus a net balance of $1,834.29. Immediately following the execution of said assignment of the account by Golbus, the plaintiff personally called upon defendant, exhibited the written assignment and demanded the payment to him of said sum. The defendant refused to pay the same or any part thereof,

claiming that Golbus was then indebted to defendant because of certain notes previously executed and delivered by Golbus to defendant, which notes, however, had not then matured, being dated, respectively, on July 24, and August 28, 1911, and each payable 90 days after date to the order of the defendant. Plaintiff thereupon commenced this suit on October 11, 1911. Plaintiff testified that at the time the said account was assigned by Golbus to him, Golbus was indebted to him in the sum of about $2000 for money previously and from time to time loaned to Golbus.

It appeared from the evidence that prior to the sale of said merchandise to the defendant the defendant had had business relations with Golbus for over 10 years; that on July 28, 1911, the defendant executed and delivered his note for $1,537, payable to the order of Golbus, and due 90 days after date, and that about the same time Golbus executed and delivered his note for the same amount payable to the order of the defendant and due 90 days after date, being one of the notes above referred to; that on August 30, 1911, the defendant executed and delivered his note for $1,755, payable to the order of Golbus and due 90 days after date, and that about the same time Golbus executed and delivered his note for the same amount payable to the order of the defendant and due 90 days after date, being the other of the notes above referred to; that Golbus discounted the two notes payable to his order at the First National Bank, Chicago, and that the defendant discounted the note for $1,537, payable to his order at the Fort Dearborn National Bank, Chicago, and received credit therefor. Golbus testified that in the course of the business relations between Golbus and the defendant, "we used to exchange notes".

The main issue of fact to be determined by the jury was, whether or not there was a verbal agreement or understanding between the defendant and Golbus, on October 4, 1911, or prior

thereto, that the two above mentioned notes given by Golbus to the defendant, dated respectively July 24, and August 28, 1911, were to be paid, taken up or canceled by the sale of said merchandise by Golbus to the defendant. The jury by their verdict evidently thought that there was no such agreement or understanding between Golbus and the defendant.

Counsel for the defendant contends (1) that the trial court erred in overruling defendant's motion made at the close of plaintiff's evidence and renewed at the close of all the evidence, that the jury be instructed to find the issues for the defendant, (2) that the verdict is against the manifest weight of the evidence, and (3) that the court erred in admitting certain evidence offered by the plaintiff. We have carefully considered these several points and are of the opinion that they are without merit.

Counsel also contends that the court erred in refusing to grant a new trial on the ground of newly discovered evidence. The affidavits in support of this motion are not incorporated in the bill of exceptions, but we have nevertheless reviewed the same as they appear in the clerk's transcript, and are of the opinion that the court did not err in denying the motion. "The rule is well settled that to authorize a new trial on the ground of newly discovered evidence it must appear that the evidence has been discovered since the trial, and that the party has not been guilty of negligence in not discovering and producing it on the former trial. Nor will a new trial be granted on the ground of newly discovered evidence where such evidence is merely cumulative and is not conclusive in its character". (Martinatis v. People, 225 Ill. 117, 120; Spahn v. People, 137 Ill. 538, 544.)

The judgment of the Municipal Court is affirmed.

AFFIRMED.

474 - 18945.

185 I.A. 250

ELEVATOR SUPPLY & REPAIR COMPANY, Appellee,	)	APPEAL FROM
vs.	)	COUNTY COURT
ELLA C. CASE, Appellant.	)	COOK COUNTY.

MR. JUSTICE BRIDLEY DELIVERED THE OPINION OF THE COURT.

The appellee, Elevator Supply & Repair Company, a corporation, (hereinafter referred to as plaintiff) obtained a judgment before a justice of the peace in Cook county against the Biddle-Murray Manufacturing Company, a corporation. From this judgment the Biddle-Murray Manufacturing Company appealed to the County Court of said county, and on November 22, 1906, filed in said court an appeal bond in the penal sum of $145, with the appellant, Ella C. Case, (hereinafter referred to as defendant) as surety thereon, conditioned, among other things, to pay whatever judgment that might be rendered against said Biddle-Murray Manufacturing Company by said County Court on the trial of said appeal, together with costs. Subsequently a trial was had in the County Court, resulting in a judgment in favor of plaintiff and against the Biddle-Murray Manufacturing Company for the sum of $63.98. From this judgment an appeal was prosecuted to this court, where the judgment was affirmed. (Elevator Supply & Repair Company v. Biddle-Murray Manufacturing Company, 156 Ill. App. 461.)

Subsequently, on June 12, 1911, a writ of scire facias was sued out of the County Court, commanding the sheriff of Lake County, Illinois, that he summon the said Ella C. Case to appear before the County Court, on the first day of the next term thereof, to be held on the second Monday of July, 1911, then and there to show cause, if any she had, why judgment should not

be rendered against her for the amount of said judgment and costs. In said writ mention was made of the recovery of said judgment, of the same being unsatisfied, and of the filing of said appeal bond signed by the defendant as surety. The writ was endorsed by said sheriff of Lake county showing that the same had been served by him by reading the same to the defendant and by delivering to her a copy thereof on June 23rd, 1911. The writ, so endorsed, was filed in the County Court June 27, 1911, which was more than ten days before the first day of the July term of said court. This writ of scire facias was issued under and by virtue of the provisions of section 71 of the act of 1872 in relation to Justices and Constables, as amended in 1879, as follows:

> "In case of appeal from judgments of justices of the peace, the appellee shall be entitled to judgment, not exceeding ten per cent. damages upon the amount of the judgment, if the appeal is dismissed for want of prosecution, or if the court shall be satisfied that the appeal was prosecuted for the purposes of delay. And the court may, at the election of the appellee render judgment against the appellant for the amount of the judgment from which the appeal is taken, with damages as hereinbefore provided. And thereupon the appellee shall be entitled to a scire facias against the sureties on the appeal bond in such case, and such writ of scire facias shall be made returnable at the next succeeding term of said court, and if served ten days before the commencement of said term, and unless sufficient cause be shown by such sureties, the court shall render judgment against such sureties for the amount of judgment rendered against their principal."

On the return day of the writ, viz, on July 10, 1911, the defendant appeared and filed a plea in abatement to the jurisdiction of the court, in which she averred that she resided and was served in a county other than that in which the writ issued. To this plea in abatement a demurrer was interposed. The plea was not a good plea. (Challenor v. Niles, 78 Ill. 78; Grieman v. People, 3 Gilm. 351; Straus v. Oltusky, 62 Ill. App. 660, 661.)

On August 4, 1911, the defendant filed three pleas in bar. The first was a plea of nil debet, and the second and third were pleas in the nature of pleas of non est factum, but in neither of the two last mentioned pleas did the defendant deny the signing of said appeal bond by her. In the second plea she alleged that "the said supposed writing obligatory in said scire facias mentioned is not the deed of the said Biddle-Murray Mfg. Co.;" and in the third plea she alleged that "the person who executed the said supposed bond for and in behalf of the said Biddle-Murray Manufacturing Company was not an officer of said company, or its duly authorized agent or attorney in fact, and was without power or authority to sign, execute and deliver the said supposed writing obligatory" of the said company. To these pleas, and each of them, the plaintiff filed a general demurrer. On February 20, 1912, this demurrer was overruled by the court without prejudice. On June 27, 1912, it appears from an order entered of record in the County Court that the parties appeared by their respective attorneys, that a hearing was had upon said pleas of the defendant purporting to show cause why she should not be made a party to said judgment, that the attorney for the plaintiff moved that said pleas be stricken from the files and that the said defendant be made a party to the judgment and that plaintiff have execution against her for the amount of said judgment and costs, and that the court granted the motion and struck said pleas from the files and ordered and adjudged that said defendant be made a party to said judgment in the sum of $63.98, and costs taxed, and that plaintiff do have execution against her on said writ of scire facias in said amount and for costs. From this judgment the defendant prayed an appeal to this court, which was allowed upon filing an appeal bond in the sum of $250 within 30 days. Leave was given to file a bill of exceptions within 60 days. The appeal was perfected by filing the appeal bond within

the time, but it does not appear that any bill of exceptions was at any time filed.

The principal contention of counsel for defendant is that the court erred in striking defendant's pleas, filed August 4, 1911, from the files and entering the judgment.

A writ of scire facias is considered in this State both as a process and as a declaration. (Marshall v. Maury, 1 Scam. 231; McFadden v. Fortier, 20 Ill. 509, 515.) In such a proceeding as the present one the defendant's plea of nil debet was bad. (Kilgour v. Drainage Commissioners, 111 Ill. 342, 348; McDonald v. People, 222 Ill. 333, 338; McNamara v. People, 183 Ill. 164, 168; Chipps v. Yancey, Breese 19; Mix v. People, 92 Ill. 549.) And, even if the defendant in her two pleas of non est factum had denied the execution of said appeal bond by her, such pleas would not have been proper, for the reason that the bond was filed in the County Court and became a record of that court, which cannot be disputed. (McNamara v. People, 183 Ill. 164, 167; Johnston v. People, 31 Ill. 469, 472; People v. Trout, 151 Ill. App. 313, 315.) The defendant in her pleas nowhere alleged a satisfaction or discharge of the judgment against the Biddle-Murray Manufacturing Company. The pleas tendered immaterial issues, and the action of the court in striking them from the files was proper. (McClure v. Williams, 65 Ill. 390; Consolidated Coal Co. v. Peers, 166 Ill. 581, 585.) Furthermore, as there is no bill of exceptions before us, it must be presumed that the action of the court in striking said pleas from the files and entering the judgment was fully warranted. (Consolidated Coal Co. v. Peers, supra; Kern v. Strasberger, 71 Ill. 303, 306.)

On June 26, 1895, our General Assembly passed an act entitled "An act to revise the law in relation to justices of the peace and constables." This act did not contain any clause

repealing the old act of 1872. (Gibson v. Ackermann, 70 Ill. App. 399, 403; McMillen v. Wolff, 83 Ill. App. 227, 228.) Several sections of the old act, including section 71 as amended, are omitted from the revised act. These sections are set forth in Hurd's Illinois Statutes, edition 1912, on pages 1481-4. No point was made by the defendant in the County Court, nor is the point here made, that said section 71 of the old act had been repealed by implication. If the question were raised we would be inclined to hold that said section 71, notwithstanding the passage of the revised act, is in full force and effect. (Gibson v. Ackermann, supra; McMillen v. Wolff, supra.)

The judgment of the County Court is affirmed.

AFFIRMED.

490 - 12961.

185 I.A. 252

EDWARD MURPHY, Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT
CITY OF CHICAGO, Appellant.	)	COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an action brought against the City of Chicago for damages for personal injuries sustained by Edward Murphy, plaintiff, when one of the wheels of the wagon he was driving went into a hole in the pavement on Plymouth Place, about 250 feet south of Polk Street, in said city, and plaintiff was thrown from his seat to the pavement, sustaining the injuries complained of. This case was tried before a jury, resulting in a verdict finding the City guilty, and assessing plaintiff's damages at the sum of $1250. Judgment was entered upon the verdict, which judgment it is sought by this appeal to reverse.

The accident happened on the afternoon of December 19, 1910. Plymouth Place was a public street on which there was a heavy traffic, and on which there was one street car track. The hole in question was on the inside of the west rail of said track and between a catch basin and the rail. "There was a kind of a depression in the cobble-stones there." The hole was about 3 feet long, 3 to 8 inches deep, and was variously estimated at from 3 to 8 inches wide. "It was just wide enough at the bottom to stick the wagon. * * The condition of the top was such that if a man came within a foot or two of it, the wagon would slide in it." One witness, a driver of an express wagon, testified that the hole had been there for a year or more, and that it first came to his attention because of the fact that one of the wheels of the wagon he was driving slid into the hole. Another witness,

a teamster, testified that he had seen the hole there for about nine months, and at one time had seen a wagon stuck in the hole.

Plaintiff testified that he was a teamster; that he sometimes drove on Plymouth Place once a day and sometimes once a week; that he had been driving teams on that street on and off for six years; that at the time of the accident he was driving a heavily loaded two-horse truck south on said street; that meeting another team he turned his team to the right to give the other wagon "half the way"; that suddenly the left front wheel of his wagon "got ketched in the rut and stopped dead still", and he was thrown from his seat to the east and he fell on the pavement and said catch basin, causing injuries to his ribs, left side and left shoulder; and that he had never noticed the particular hole before and did not know that it was there.

Counsel for the City do not claim that the damages awarded by the jury are excessive, and but two points are urged as grounds for a reversal of the judgment, (a) that the trial court erred in not directing a verdict for the City on the ground of the contributory negligence of the plaintiff, and (b) that certain remarks of the court during the preliminary examination of the jurymen were prejudicial to the City.

After careful consideration we are of the opinion that there is no merit in either of the contentions. We think that, under the facts as disclosed by this record, the question whether the plaintiff was guilty of contributory negligence was one for the jury to pass upon, and that their verdict should not be disturbed. (City of Chicago v. Sullivan, 139 Ill. App. 675, 680; Cleveland, etc., Ry. Co. v. Keenan, 190 Ill. 217, 219; City of Chicago v. Kubler, 133 Ill. App. 520, 525; City of Aurora

v. Scott, 185 Ill. 539.)

As to the second point, it appears that when the case was called for trial the attorney for the City was present in court, but that the attorney for the plaintiff was not present, and it was represented to the court that said attorney was then engaged in another trial but would shortly be through. The trial court then proceeded to examine the jurymen and to inform them as to the details of the case and what the issues were. No objections to this course were made by the attorney for the City. Subsequently, the trial court made the remarks here complained of, but at the time no objection thereto was made by the attorney for the City, nor was any exception taken. And the transcript of the record shows that subsequently the attorney for plaintiff came into the court room, and thereupon the jurymen were further examined by the attorneys of both parties, and a jury of twelve men were finally accepted and sworn to try the issues. We cannot say that the said remarks of the court were prejudicial to the City, but even if they might be so considered, the City is in no position to here urge that they constituted error.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

512 - 18983.

185 I.A. 253

JOHN R. BLENNERHASSETT, Appellee,	)	APPEAL FROM
vs.	)	SUPERIOR COURT
LA SALLE, a corporation, Appellant.	)	COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $600 rendered against LaSalle, a corporation, defendant below, in the Superior Court of Cook County, in an action for damages for personal injuries sustained by John R. Blennerhassett, plaintiff below.

The defendant was possessed of and had the control and management of an office building, known as the New York Life Building, situated on the northeast corner of LaSalle and Monroe streets in the city of Chicago. The Kimball Cafe, the employer of plaintiff, was a tenant in the basement of the building. Opening off LaSalle street and running east along the north side of the building is an alley, and in this alley, some distance east of LaSalle street and immediately north of said building, there was, on the day of the accident, a hoist or elevator, which had been used by said Kimball Cafe for many years to convey supplies and materials in and out of the restaurant. The elevator ran from the level of the basement floor to about four feet above the sidewalk in the alley. The shaft or hole was about five feet long north and south and about four feet wide east and west, and when not in use was covered by two horizontal iron doors or shutters, meeting in the middle of the shaft. These doors were fastened to the sidewalk by hinges and could be easily opened or closed when desired. One door opened back towards the north and the other towards the south. About two years before the accident a tall iron contrivance in the shape of an inverted letter "U" had been

attached to the platform of the elevator, extending upwards from said platform for a distance of about 8 feet. It had been put there for convenience, so that as the elevator moved up or down said doors would open or close automatically. When the floor or platform of the elevator was even with the level of the basement floor the top of said contrivance was below the closed doors or sidewalk level. As the elevator moved upwards the top of said contrivance, pushing against said doors, would open them, one door towards the north and the other towards the south. Then the doors, unless either of them was moved away from this inverted letter "U" contrivance, would remain resting against the sides of said contrivance, but when the elevator moved downwards the doors would gradually close as said contrivance also descended. It appeared from the testimony of the plaintiff that for many years prior to the putting of said contrivance on said elevator that the said doors had to be opened and closed by the person or persons using or operating said elevator, and when opened they were tied with wires to a railing around the shaft; that plaintiff had been employed by the Kimball Cafe for about 15 years and was well acquainted with the method of operation of the elevator and doors, both before and after said contrivance was attached, and had many times during said period operated the elevator himself; and that it was a part of his work to go with a horse and wagon to South Water street, buy supplies for the cafe, return with them, unload them onto the elevator, go down with them in the elevator and from thence into the restaurant. This was what he was doing on the morning of the accident, which happened about 8 o'clock, Monday morning, March 7, 1910.

The declaration consisted of two counts, to which the defendant filed a plea of the general issue. In the first count, after alleging the defendant's control and management of said building and said elevator, and describing the construction and

operation of said elevator, and averring that it was the duty of defendant to use reasonable care to keep and maintain said elevator in a reasonably safe condition, the plaintiff charged that "said defendant negligently and carelessly allowed the said elevator, and the safety appliances with which the same was equipped to keep the doors of the same from falling on the person riding in and upon the said elevator, to be out of order and removed, which fact was well known, or by the exercise of ordinary care ought to have been known, to the defendant, but not to the plaintiff, so that while the plaintiff with all due care and caution for his own safety was attempting to convey materials from the surface of the ground into the basement of said building, * * the iron doors of the said elevator descended down and upon plaintiff, by reason of the fact that the said safety appliance had been removed, and by means of the premises the plaintiff was injured", etc.

In the second count the plaintiff charged that the defendant "caused to be removed from the said elevator the safety appliance attached thereto, * * and negligently * * failed and refused to give the plaintiff any warning of the removal of said safety appliance, so that while the plaintiff, with all due care and caution for his own safety, * * was descending on the said elevator, without any knowledge of the removal therefrom of the said safety appliance, the said iron doors, by reason of the removal of the said safety appliance, fell down and upon the plaintiff, which happening the plaintiff could have provided against if he had been informed of the removal of the said safety appliance."

On the trial the plaintiff testified in his own behalf, and his son, who was 15 years of age at the time of the accident, also testified. At the conclusion of plaintiff's evidence the defendant moved for a directed verdict in its favor, which motion was denied and an exception taken. The defendant introduced no evidence. At the conclusion of the arguments to the jury, which were

made by the attorneys of both parties, the court instructed the jury at the request of the defendant that, under the law and the evidence, the plaintiff could not recover upon the second count of the declaration, and that they should disregard that count in arriving at their verdict. The court, however, refused to give a similar instruction as to the first count. Other instructions were offered by the respective attorneys and given. The jury returned a verdict finding the defendant guilty and assessing plaintiff's damages at $600. Defendant's motions for a new trial and in arrest of judgment were overruled and the judgment appealed from was entered.

As to the details of the accident, plaintiff on his direct examination testified, in substance, that he drove up with his wagon, unloaded the goods and put them on the elevator; that after the goods were all on he got on the elevator, pulled the chain in order to make the elevator go down, and, as it was going down, the iron door on the north side fell and hit him on the top of his head while he was "standing straight up" on the elevator floor; that at that time the inverted letter "U" contrivance "was off and there was nothing to hold the doors back". On cross-examination he testified, in substance, that on the Monday morning mentioned he backed the wagon to the north side of the elevator with the front of the wagon towards the north; that the platform of the elevator was up about "pretty near level with the box of the wagon"; that the iron doors were "standing up straight"; that the north door was standing alongside a "little iron railing" about two feet high, and the south door leaning against the wall of the New York Life Building; that it was daylight and he "could see things around there"; that there was nothing to hide the inverted letter "U" contrivance from him if it had been on the elevator; that when he last saw the elevator on the Saturday preceding the Monday morning

of the accident, he noticed that a man who was engaged in repairing the floor of the elevator had removed said contrivance from said floor, and it was standing near the elevator up against the wall of the building; that when he came to the elevator on Monday morning it was in the same condition as when he saw it on Saturday, save that the floor of the elevator was "pretty near fixed", and that when he was transferring the goods from his wagon to the floor of the elevator his son, standing in the back end of the wagon, assisted him in that work. The son testified that plaintiff, after the goods had been put on the floor of the elevator, got on, pulled the chain to go down, and the "elevator went down aways and then the north door fell"; and that "the level of the top of the elevator shaft was about to his shoulder when the door started to fall."

Counsel for defendant contend that the evidence is insufficient to support the verdict, and that the trial court erred in refusing to direct a verdict for defendant and also in refusing to grant a new trial and entering the judgment. The argument is that the evidence does not disclose that the defendant was guilty of any negligence, in that it was not legally bound to anticipate that plaintiff would be injured as a result of the removal of the inverted letter "U" contrivance, and that the plaintiff was guilty of contributory negligence, barring a recovery, in that plaintiff knew of the removal of said contrivance from the platform of the elevator and knew of the position of said iron doors and other surrounding conditions, and yet he took no steps to prevent the doors falling, as he could easily have done and as he had previously done before said contrivance was first attached to the elevator.

By the instruction of the court the jury were told to disregard the second count of plaintiff's declaration, the gist of which was that the defendant negligently failed to warn plaintiff of the removal of said contrivance and of which removal plaintiff

did not have knowledge.

The case, however, went to the jury on the first count, the gist of which was that defendant negligently allowed the said contrivance on said elevator to be out of order and removed, which fact was or ought to have been known to defendant, but was not known to the plaintiff. Under the facts in evidence in this case we are of the opinion that the plaintiff cannot recover under this count and that the trial court erred in entering the judgment against the defendant. By plaintiff's own testimony it appears that he knew that said contrivance had been removed from the elevator prior to the accident and was not on the elevator at the time of the accident. And we are of the opinion that the injury to plaintiff was the result of his own negligence in not at the time properly securing the doors so as to prevent their falling upon him when the elevator descended.

Accordingly the judgment of the Superior Court will be reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

FINDING OF FACT. We find as an ultimate fact that the plaintiff was guilty of negligence that proximately contributed to the injury complained of.

369 - 18836.

JULIUS GEBHARD, Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT
BREWERS MALTING COMPANY, a Corporation, Appellant.	)	COOK COUNTY.

STATEMENT OF FACTS. This is an appeal from a judgment of the Circuit Court of Cook County, in favor of the appellee, hereinafter referred to as the plaintiff, and against the appellant, hereinafter referred to as the defendant. The plaintiff commenced a suit in attachment on February 24, 1912, returnable to the March term. Under the attachment writ, a levy was made upon certain real estate of the defendant. Personal service was had upon certain garnishees, and service was had on the defendant by publication; the last publication being made on March 19, 1912. The declaration was filed on March 14, 1912, two days before the first day of the March term of said court.

The declaration consisted of two special counts and the common counts; each of the special counts sets forth a written contract, dated March 25, 1911, between the defendant and the plaintiff and one Frank L. Gebhard; on April 4, 1912, a default was entered, damages were assessed at $1730.60, and judgment was entered for that amount. On April 8, 1912, one of the days of the March term, the defendant moved to vacate the default and judgment, and on April 15, 1912, still one of the days of the March term, the court denied this motion, to which action of the court the defendant excepted. The defendant on the same day prayed this appeal from the judgment. In the April term, the defendant sued out a writ of error to review the action of the court in denying the motion of the defendant to vacate the default and judgment. This writ of error is pending before this court, - General No. 18837.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The plaintiff has filed a motion in this court, that this appeal be dismissed. Plaintiff contends that the defendant did not have a right of appeal from the judgment order; that the only right of appeal he had was from the order denying the motion to vacate the default and judgment. The judgment order and the order denying the motion to vacate were both final orders, and the defendant has a right of appeal from either or both. To obtain a review of both orders, by appeal, however, it would require a separate appeal from each order. The present appeal is from the judgment order. The defendant did not pray an appeal from the order denying the motion to vacate, but at a term, subsequent to the one at which judgment was entered and the motion to vacate was denied, it sued out (as it had a right to do) a writ of error to review the action of the court in denying the motion to vacate.

The plaintiff insists that this appeal was brought prematurely and that it should be dismissed for that reason. In support of this contention the plaintiff says that the case in the lower court at the time of the appeal had not been finally disposed of as to the garnishees, and that this appeal is therefore premature. There is no merit in this contention. The judgment against the defendant on April 4, 1912, from which it is now appealing, was a final one, from which the defendant had a right to appeal, regardless of the condition of the proceedings against the garnishees. It is not necessary to cite authorities in support of this proposition. The motion to dismiss the appeal is denied.

The default and judgment against the defendant was entered by the Circuit Court of Cook County on April 4, 1912, one of the days of the March term of that court. Defendant strenuously contends that the default and judgment orders in

this case were erroneous for the reason that the declaration in the case was filed less than ten days before the beginning of the March term. The declaration was filed on Saturday, March 16, 1912, two days before the third Monday of March, - the third Monday of March being the first day of the March term of the Circuit Court of Cook County. The claim of counsel for the defendant is that a default and judgment could not be entered against the defendant during the March term, for the reason that the declaration in the case was not filed ten days before the commencement of the said term, and that under the provisions of Sec. 32 of the Practice Act the defendant was not obliged to plead until the April term. The Supreme Court, in the case of Kirk v. Elmer Dearth Agency, 171 Ill. 207, has held that the requirements of the Practice Act do not control the practice in attachment cases in matters wherein the attachment act has made different provisions. The very point raised by the defendant in this case was squarely passed upon by the court in the last mentioned case and the ruling was adverse to the contention of the defendant.

Counsel for the defendant strongly insist that the opinion in the case of Kirk v. Elmer Dearth Agency, supra, is a poorly considered one, and that if the doctrine of that case is to be followed, it will lead to grave injustices. Without admitting that there is any merit in the argument of counsel, it is sufficient to say, in answer thereto, that although the opinion in question was rendered sixteen years ago this month, it has never been reversed or qualified, and it is the law that must govern this court in its action.

The defendant has argued at great length that the two special counts are fatally defective, but as the declaration contains the common counts, it is unnecessary for us to pass upon the special counts. Although a special count in a declara-

ation shows no cause of action, yet if the declaration contains the common counts, and judgment is rendered by default, it will be presumed in the absence of a bill of exceptions showing the contrary, that the court heard evidence to justify the judgment under the common counts. Rowell v. Chandler, 83 Ill. 288; French v. Baker, 21 Ill. App. 436.

Defendant contends that the judgment entered in this case is not for any certain sum of money and is void for indefiniteness. On April 4, 1912, the court entered an order that covered the default, the assessment of damages, the judgment of the plaintiff against the defendant, the default of the garnishees and the conditional judgment against the garnishees. The order reads as follows:

> "This day comes the plaintiff by his attorney and it appearing to the court that the defendant has been duly notified of the pendency of this suit by publication of notice and by mailing a copy of the same to it pursuant to statute in such case made and provided and it being now here three times solemnly called in open court, comes not or does any person for it, but herein it makes a default which is on motion of plaintiff's attorney ordered to be taken and the same is hereby entered herein of record, wherefore the plaintiff ought to have and recover of and from the defendant his damages sustained herein by reason of the premises.
>
> Thereupon reference is had to the court to assess the plaintiff's damages sustained herein and the court now here after hearing all the allegations and proofs submitted herein by the plaintiff and being
> 1730.60. fully advised in the premises, assesses the plaintiff's damages to the sum of Seventeen Hundred and Thirty Dollars and Sixty Cents.
>
> Therefore it is considered by the court that the plaintiff do have and recover of and from the defendant Brewers Malting Company his said damages of Seventeen Hundred and Thirty and Sixty Cents in form as aforesaid by the court assessed together with his costs and charges in this behalf expended and have execution therefor against the property attached herein by virtue of the writ of attachment issued in said cause.
>
> And it further appearing to the court that due personal service of the writ issued in said cause had been had on the German Fire Insurance Company and Home Insurance Company of New York garnishees herein and they being called in open court come not nor does any person
> Cond. Judgt. for them, but herein they make default which is on motion
> vs. of plaintiff's attorney ordered to be taken and the same
> Garnishees. is hereby entered herein of record wherefore a condi-
> 1730.60. tional judgment ought to be rendered herein against said garnishees.

> Therefore it is considered by the court that the defendant for the use of the plaintiff do have and recover of and from the said garnishees the sum of seventeen hundred and thirty dollars and sixty cents being the amount of the judgment heretofore rendered herein against the defendant together with all plaintiff's costs in this as well as in that behalf expended unless said garnishees after being duly served with scire facias to be issued shall show cause if any they have why the above conditional judgment should not be made final and execution issue accordingly."

On December 31, 1912, the plaintiff appeared before the same judge that entered this last mentioned order and made a motion that the order of April 4, 1912, as entered by the clerk, be amended so as to show the true judgment of the court. The amendment proposed by the motion was that the word "dollars" should be inserted between the word "thirty" and the word "and" in that part of the order that purported to recite the judgment for the plaintiff against the defendant. The court, over the objection of the defendant, allowed the amendment to be made. The defendant insists that the trial court had no minutes of his own to aid him in his determination of the question as to whether the record could be amended, and that he was therefore without power to make the amendment. Defendant also complains that the court, in passing upon the motion, (at the instance of the plaintiff and over the objection of the defendant) consulted certain minutes of the clerk of the court and that he also referred to a certain affidavit offered by the defendant in support of the motion to vacate the default and judgment in this case. Defendant insists that the alleged amendment of December 31, 1912, was a void order and that in passing upon the question raised by the defendant that the judgment in the case is void for indefiniteness, the alleged amendment of December 31, 1912, must be disregarded by this court.

We may assume that the trial court erred in allowing the introduction of the clerk's minutes and the affidavit in question in support of the motion to amend the record, nevertheless,

it is quite clear that the court had the right to allow the amendment in question. The order of April 4, 1912, in itself is a sufficient warrant for the allowance of the amendment. This order recites that the court assessed the plaintiff's damages at the sum of One Thousand Seven Hundred and Thirty Dollars and Sixty Cents. The part of the order that refers to the judgment against the defendant recites "that the plaintiff do have and recover of and from the defendant, Brewers Malting Company, his said damages of Seventeen Hundred and Thirty and Sixty Cents in form as aforesaid by the court assessed." That part of the order that refers to the conditional judgment against the garnishees recites: "Therefore it is considered by the court that the defendant, for the use of the plaintiff, do have and recover of and from the said garnishees the sum of Seventeen Hundred and Thirty Dollars and Sixty Cents, being the amount of the judgment heretofore entered herein against the defendant. It clearly appeared, therefore, from an inspection of the entire order of April 4, 1912, that there had been a clerical error made in the entry of the order. What the clerical error was, also clearly appeared from an inspection of the entire order. It was not necessary for the court to refer to anything but the order itself to determine what the true judgment of the court had been. Under such circumstances the trial court had the undoubted right to correct the misprision of the clerk and to make the record conform to the truth. In the case of Frink v. Schroyer, 19 Ill. 418, there was a misstatement of the surnames of some of the parties to the suit in the judgment order. The appellant in the case asked that the judgment be reversed because of this fact. The court said (p.419):

> "The judgment cannot be reversed on account of the error appearing in the record, in the names of some of the defendants. The parties to the action, and between whom the issue was tried, appear from the declaration and the plea, and the misstatement of the

> surnames of some of these parties, defendant in the subsequent record, and judgment order, is evidently the mere clerical mistake of the officer, the clerk, in entering of record the proceedings and judgment of the court. This is apparent from inspection of the record, and the mistake is emendable by the record itself, at any time, either in the court where the record remains, or in any other court to which the record may be taken, by appeal or writ of error. Such is the letter and spirit of our statute of jeofails. Statutes 1856, Chap. 5, Secs. 1, 3 and 9. Coughran v. Gutcheus, 18 Ill. R. 390, and cases there cited.
>
> The better practice is to apply to the court where the record remains, and from which execution may issue, for the amendment correcting the names in the judgment order by the summons, declaration and plea; and this that court should, on proper application, do."

The doctrine announced in this case has been approved in Davenport v. Kirkland, 158 Ill. 175. See also, Cerny v. Glos, 261 Ill. 331.

When the judgment of April 4, 1912, is considered in the light of the amendment of December 31, 1912, there is, of course, no merit in defendant's last contention.

The judgment of the Circuit Court of Cook County will be affirmed.

AFFIRMED.

370 - 18837.

185 I.A. 256

JULIUS GEBHARD, Defendant in Error,	)	ERROR TO
vs.	)	CIRCUIT COURT
BREWERS MALTING COMPANY, a corporation, Plaintiff in Error.	)	COOK COUNTY.

STATEMENT. The defendant in error, hereinafter referred to as the plaintiff, obtained a judgment by default in the Circuit Court of Cook County against the plaintiff in error, hereinafter referred to as the defendant, and the defendant prayed an appeal to this court from this judgment. The general number of the case is 18836. An opinion has been rendered by this court in that case, and the statement of facts connected therewith may be considered as part of the statement of facts in this case. At the same term of court that the default and judgment was entered, the defendant moved the court to vacate the same. This motion was denied, and the present writ of error is sued out to review the action of the trial court in denying the motion to vacate. In support of the motion to vacate, the defendant filed an affidavit of William P. Rice, an employee of the defendant company. The following is an abstract of the substantial parts of the affidavit: That DeWitt C. Flanagan, president of the defendant company, is a resident of New York City; that said Flanagan had entire charge of the making of the contract in the declaration herein mentioned and had full knowledge of the facts and of the merits of said controversy; that said defendant through said Flanagan, early in March, 1918, obtained knowledge of the institution of the above entitled attachment suit, and said Flanagan advised affiant that the defendant was not indebted to the plaintiff herein, but the plaintiff had been fully paid by the defendant for all his services, com-

missions and expenses, and said Flanagan further directed affiant to obtain, as soon as practicable, a detailed statement of plaintiff's claim so that said Flanagan might know upon what alleged facts said plaintiff purported to base his claim in this suit for further compensation, in order that said Flanagan, after ascertaining the nature of plaintiff's claim for additional compensation, might advise affiant of the real facts relating thereto, and a proper reply thereto might be made and a proper plea filed; that pursuant to said instructions he retained an attorney (naming him) to ascertain said facts relating to plaintiff's claim and to prepare said plea; and that said attorney on numerous occasions thereafter, prior to March 16, 1912, attended at the office of the clerk of this court for the purpose of ascertaining the nature of plaintiff's claim from plaintiff's declaration, but that upon each of said occasions said attorney found no declaration had been filed and on each of said occasions said attorney so reported to affiant, and told affiant that until such declaration was filed said attorney would be unable to state to affiant the nature of plaintiff's claim; that finally, on March 16, 1912, said attorney reported to affiant that the plaintiff had finally, upon said date, filed his declaration in this case, and said attorney upon said March 16, 1912, exhibited a copy thereof to affiant; that thereupon affiant reminded said attorney that said DeWitt C. Flanagan alone had full personal knowledge of the facts and that a copy of said statement of plaintiff's claim would have to be forwarded to said president to New York City for reply before a correct plea to the declaration could be prepared, and affiant further reminded said attorney that the writ herein was returnable to the March term of this court, the first day whereof was March 18, 1912; that thereupon said attorney told affiant that under the rules of this court it would not be necessary for said

defendant to plead to the declaration in this case upon the March return day of this court, for the reason that the declaration in this case has not been filed herein ten (10) days before the first day of said March term of this court, and, that therefore under said rules of this court it would not be necessary for the defendant to appear and plead herein till the April term of this court, and said attorney further advised affiant to have a copy of said declaration made immediately and forward the same immediately to said president in New York City, and said attorney further stated that upon receipt from said president of a full statement of defendant's defense to said claim said attorney would immediately prepare, and after execution thereof, file proper pleas and an affidavit of merits setting forth said defense; that he caused a copy of said declaration to be immediately made, and forwarded to said president in New York City, and received from him advice concerning the defendant's defense; but that before sufficient time had elapsed for the preparation, forwarding to New York City for execution, and return, of proper pleas and an affidavit of merits, the plaintiff on April 4, caused judgment by default for Seventeen Hundred Thirty Dollars and Sixty Cents ($1730.60) to be entered; that affiant obtained information of said judgment on April 5, and immediately caused this affidavit to be prepared and caused notice of this motion to be served upon the attorneys for the plaintiff in the forenoon of April 6; that the March term of this court began on Monday, March 18, that the declaration herein was not filed ten (10) days before the first day of said March term, but only two (2) days before the first day of said term; that the rules of this court known as Common Law Rules 2 and 3 in force in this court at the time of the institution of this suit and at all times since, were and are in words and figures as follows: (Here affiant inserts said rules.)

Affiant says that he verily believes that defendant has a good defense to this suit upon the merits to the whole of the plaintiff's demand; that the plaintiff and defendant did make the written contract dated March 25, 1911, set forth in said declaration, but that the defendant has paid to the plaintiff all sums due to the plaintiff by the defendant under said contract; that all sums due to the plaintiff under said contract did not exceed the sum of Five Hundred Dollars ($500) and that the defendant, before suit was instituted, paid to plaintiff said sum in full; that with reference to the first item, viz: Four Hundred Thirty Dollars and Sixty Cents ($430.60) claimed to be due by the plaintiff for expenses while engaged in the sale of bonds for the defendant, said expenses did not exceed One Hundred Fifty Dollars ($150), but that plaintiff seeks in this suit to charge against the defendant expenses incurred by the plaintiff while not engaged in the sale of bonds for the defendant; with reference to the second item, viz: Five Hundred Dollars ($500) claimed to be due the plaintiff as five per cent. (5%) commission on Ten Thousand Dollars ($10,000) worth of bonds alleged to have been sold by the plaintiff that the amount due by the defendant to the plaintiff as commissions for the sale of bonds did not exceed Two Hundred Fifty Dollars ($250); that only Five Thousand Dollars ($5,000) worth of bonds were sold by the plaintiff and paid for, upon which amount due plaintiff for commissions under said contract was Two Hundred Fifty Dollars ($250); that plaintiff did purport to sell in addition Five Thousand Dollars ($5,000) more bonds, but that said bonds were never paid for, without any default on the part of the defendant, and that the plaintiff is not entitled to any commissions upon said last mentioned bonds; with reference to the third item claimed to be due to the plaintiff, viz: Eight Hundred Dollars ($800) being two per cent. (2%) commission on

forty thousand (40,000) bushels of malt, that no sum whatever was earned by or due to plaintiff as commissions for the sale of malt because affiant says that, without any default on the part of the defendant, no malt whatever was taken by the subscribers to said bonds under the terms of the subscription agreement delivered to the plaintiff or otherwise; with reference to said last item claimed to be due by the defendant to the plaintiff, viz: Five Hundred Dollars ($500) for fifty (50) days at Ten Dollars ($10) per day devoted by the plaintiff to the sale of bonds of the defendant, that said plaintiff did not devote fifty (50) days to the sale of bonds for the defendant, but devoted to such sale not to exceed ten (10) days, for which the plaintiff was entitled to receive One Hundred Dollars ($100) and not Five Hundred Dollars ($500) as claimed by him.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The defendant contends that the defendant was not obliged to plead until the April term of the court, for the reason that the plaintiff had not filed his declaration ten days before the first day of the March term of the court, and that therefore, the trial court erred in entering the default and judgment order in the case. In support of his contention, defendant cites Rule 2 of the Circuit Court which reads as follows:

> "Rule 2. In all suits at law made returnable to any term of the Court where process has been duly served and declaration filed ten days before the first day of the term, the defendant shall plead or demur before the opening of Court on the morning of the third day, and the plaintiff shall be entitled to judgment by default in all suits where the plea or demurrer is not so filed, unless the party has obtained an extension of the rule so to plead or demur. Any defendant entering his appearance without service will be required to plead or demur to the declaration at such time as he would be so required if he had been served with process on the day of the entry of his appearance."

The present case is an attachment proceeding, and service on the defendant was had by publication, and therefore Rule 2 must be read in connection with the provisions of the

Attachment act, and when it is so read it is quite clear that the rule was not meant to apply to attachment cases in which service is had on the defendants by publication.

The defendant insists that it showed on the motion to vacate that it had a meritorious defense to the claim of the plaintiff and that the defendant had exercised proper diligence in making its defense and that the trial court, under the circumstances, should have vacated the default and judgment.

"It has always been a well settled rule in this State that a motion to set aside a default is addressed to the sound legal discretion of the court, and, unless it appears that such discretion has been wrongfully and oppressively exercised, this court, on appeal, will not interfere. (Culver v. Brinkerhoff, 180 Ill. 548, and cases there cited)." Eggleston v. Royal Trust Co., 205 Ill. 178. To warrant the trial court in vacating the default and judgment it was necessary for the defendant to prove that it had a meritorious defense to the claim of the plaintiff and that it was not guilty of negligence in making its defense. The only evidence offered by the defendant in support of the motion to vacate was the affidavit of William P. Rice, an employee of the defendant company. In reference to the question as to whether the defendant had a meritorious defense to the claim of the plaintiff, it is clear, from a reading of the affidavit of Rice, that his knowledge on that subject was purely of a hearsay character. He states that the president of the defendant company, DeWitt C. Flanagan, was the person who had entire charge of the making of the contract with the plaintiff, and had full knowledge of the facts and of the merits of the controversy; that "Flanagan alone had full personal knowledge of the facts", and that after the default, he, Rice, communicated with Flanagan for the purpose of having Flanagan advise Rice of "the real facts relating to the contract with the plaintiff". The defendant did

not produce an affidavit from Flanagan nor did it offer any reason for its failure to do so.

The defendant strenuously insists that even if it be held that Rule 2 does not apply to a case like the present one, still it must be conceded that an attorney might well construe the rule in question as applying to a case like the present one, and that therefore the defendant should not be chargeable with negligence in this case because (defendant says) its attorney did so construe the rule and the failure to plead was the result of such construction. The trouble with this contention of defendant is, that there is no evidence, <u>even of a hearsay character</u>, that the failure to plead was due to a misinterpretation of Rule 2. The attorney who had charge of the case for the defendant prior to and at the time of the default and judgment also had charge of the case at the time that the motion was made to vacate the default and judgment, and yet, this attorney did not make an affidavit in support of the motion. All that Rice says on the subject of the failure to plead is that said attorney, on March 16, 1912, <u>nineteen days before the default was taken</u>, told him "that under the rules of the Circuit Court it would not be necessary for the defendant to plead to the declaration in the case upon the March return day of the court, for the reason that the declaration in the case had not been filed ten days before the first day of the March term of the court, and that therefore, under the rules of the court, it would not be necessary for the defendant to appear and plead until the April term of the court." This evidence is very far from proving that the attorney of the defendant was deceived until the day of the default by Rule 2. In fact, Rule 2 figured in the motion to vacate only through the affidavit of the layman Rice. The attorney for the defendant did not see fit to inform the court what he knew concerning the default, and as we read

the record there is absolutely nothing in the showing made to rebut the presumption of negligence arising from the failure to plead in apt time. If the defendant had made a clean-cut showing that it had a meritorious defense to the claim of the plaintiff, and if it had further shown fairly and frankly that the attorney of the defendant had misinterpreted Rule 2 and that the failure to plead was due to this fact, we are satisfied that the trial court would have granted the motion to vacate the default and judgment, but no such showing was made, and we cannot say that the trial court, in this case, wrongfully and oppressively exercised the discretion vested in him.

The defendant insists that the trial court erred in admitting the affidavit of the plaintiff in opposition to the motion to vacate the default and judgment. The affidavit of the plaintiff went to the question as to whether the defendant had a meritorious defense to the claim of the plaintiff, and it should not have been admitted by the court. Gilchrist Trans. Co. v. Northern Grain Co., 204 Ill. 510. Its admission, however, was not prejudicial error. It devolved upon the defendant to show that it had a meritorious defense to the claim of the plaintiff, and that it was not guilty of negligence in the premises, and it failed to make a proper showing in either of these essentials.

The plaintiff in this case has made a motion in this court that the writ of error in this case be dismissed. This motion is denied. The reasons for the denial of the motion are given by the court in the case of Gebhard v. Brewers Malting Company, General No. 18836.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

181 - 18637

CHARLES F. NORRIS,
Defendant in Error,

vs.

HESS BRIGHT COMPANY,
a corporation,
Plaintiff in Error.

185 I.A. 262

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BAKER
DELIVERED THE OPINION OF THE COURT.

In an action by defendant in error Norris against the Hess Bright Company in the Municipal Court for breach of a contract of employment, plaintiff had judgment for $450, to reverse which the defendant prosecutes this writ of error.

The original contract was between Norris and the Hess Bright Manufacturing Company, was in writing and made about January 1, 1910. About April 1, 1910, the defendant corporation was organized and took over the business of the Hess Bright Manufacturing Company. Both Norris and the Hess Bright Company treated the contract of employment after April 1, 1910, as a contract between Norris and the Hess Bright Company. Mr. Bruegal for the Company wrote Norris Dec. 6, 1910, "You have a contract with us for a yearly term which requires for its termination (except by mutual consent) a three months prior notice". After the Hess Bright Company was organized that Company paid plaintiff his salary up to February 15, 1911, and Norris' letters were addressed to the Hess Bright Company and the answers were in the name of that Company. We think that the original contract of employment was binding both on plaintiff and the Hess Bright Company.

The contract of employment contains this provision:

"7. This agreement is to remain in full force for one year from the date hereof, that is to say until December 31st, 1910. * * * After December 31st, 1910, this agreement becomes self perpetuating from year to year unless three (3) months prior to the expiration of any year due notice is given by one party to the other of its or his desire to modify, cancel or annul the agreement at the end of the current year."

Plaintiff in error contends that if the Hess Bright Company is liable on the contract, it was not necessary, under the provision above quoted, to give notice three months prior to December 31, 1910, in order to cancel the contract before that date. The defendant Company did not give any notice of its intention to discharge the plaintiff or terminate the contract prior to December 6, 1910. On that day Bruegal, for the defendant Company, wrote plaintiff as follows: "the best way to relieve yourself and us of an embarrassing situation would be for you to immediately set about looking for another business connection, and resign from the Hess Bright Co. when you are reasonably assured of that or before if you prefer." This letter was not a discharge nor a notice of the desire of the defendant to cancel its contract, and in no way affected the rights of either party under the contract. It was not until January 28, 1911, that defendant discharged plaintiff, and February 11 it sent him a check for $50 for his salary from February 1 to February 15.

The right to discharge the plaintiff for sufficient cause was a right of the defendant independent of contract, but the right to cancel or annul the contract under its provisions was a right that could be exercised only at the end of the current year, and then only in case three months prior to the expiration of the year three months notice of such intention had been given.

Whether the defendant was so incompetent as to give to the defendant the right to discharge him for incompetency and whether because of any act or omission of his it had the right to discharge him, were, we think, on the evidence, questions of fact on which the verdict of the jury must be held conclusive.

The plaintiff's compensation was to be a certain share of the profits, but he was guaranteed $100 per month. He was able to earn between February 15 and December 7, 1911, only $198.25. We cannot say that the damages awarded him were excessive.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

281 - 18743

CITY OF CHICAGO, Defendant in Error,	ERROR TO MUNICIPAL COURT OF CHICAGO.
vs.	
RUTH LONG, Plaintiff in Error.	

185 I.A. 268

MR. PRESIDING JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was charged with keeping a house of ill fame or assignation in violation of a certain section of the Municipal Code of Chicago. When the case was called for trial, the cases of three "ladies" charged with being inmates and two men charged with being patrons of the house were also called for trial. The record recites that the jury was, "accepted without objections being made by either counsel, to try the issues." No order of consolidation was made, but the jury were sworn separately in each case to try the issues, and the jury was instructed to return and did return a separate verdict in each case. The jury found plaintiff in error, Ruth Long, guilty and assessed against her a fine of thirty-five dollars. The judgment brought before us by the writ of error is a separate judgment against Ruth Long on the verdict against her.

We think that having made no objection to the jury being sworn to try the issues in the other cases, and having accepted the jury without objection when sworn separately to try the issues in each case separately, plaintiff in error cannot now be heard to complain that the Court erred in trying the six cases together.

We also think that on the evidence the jury

might properly find the plaintiff in error guilty, and the judgment is affirmed.

AFFIRMED.

319 - 18783

OSCAR ERIKSON,
Appellee,

vs.

JAMES H. WARD,
Appellant.

185 I.A. 269

APPEAL FROM THE MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

July 1, 1907, the parties to this cause entered into a contract in writing whereby Erikson agreed to erect a building for Ward and furnish all labor and materials therefor by November 1, 1907, for $4800. March 17, 1911, Erikson brought this action in the Municipal Court claiming that there was due to him from Ward on the contract, including $195 for extras, $2495.00. Ward filed an affidavit of defense "to the whole of plaintiff's demand" and an itemized statement of set off or counter claim, verified by his affidavit, wherein he stated that there was due to him from Erikson $3017.00. The jury returned a verdict finding the issues "against the defendant" and assessing plaintiff's damages at $2000. Plaintiff remitted $45 from the verdict. Defendant filed a motion in writing for a new trial, stating twenty two reasons why such new trial should be granted, but the Court denied his motion, rendered judgment against him for $1955, and plaintiff appealed.

Before this suit was brought Erikson filed his bill in equity against Ward for a mechanic's lien for the amount claimed to be due him under the contract sued on in this case, and much testimony was taken in the cause. Appellant Ward now contends that this was an election by Erikson of remedies and this action therefore can not be

maintained. With this contention we cannot agree. A former suit pending in equity cannot be pleaded in abatement of a subsequent action at law. 1 Ancy. of Pl. & Pr. 751. If after a bill in equity has been filed, so that the jurisdiction of the court has attached and the case is not one where a party may proceed, as in case of a mortgage, in equity and at law at the same time, the Court of Equity will compel the party to make an election in which Court he will proceed and the proceedings in the other Court will be stayed. Blanchard v. Stone, 16 Vt. 234; Story Eq. Jurisp., Sec. 889. If the defendant in an action at law is entitled to any advantage from the pendency of a bill in equity, it is only by injunction from the Equity Court to stay the proceedings at law. Rattel v. Conant, 156 Mass. 418, 424.

Appellant further contends that the plaintiff was not entitled to recover because he had not obtained a license as contractor from the City of Chicago. We think the jury might from the evidence properly find that plaintiff had a license, but if not, the defendant did not in any one of his many grounds for a new trial state as a ground that the plaintiff had no license and therefore must be held to have waived the objection.

We find in the record no reversible error in the rulings of the Court on questions of evidence.

The contract provides that Erikson shall erect the building agreeably to the Drawings and Specifications made by . N. Walter, in a good and workmanlike manner, "to the satisfaction of the party of the first part (Ward) and under the direction of the said Walter, to be testified by a writing or certificate under the hand of the said Walter." Ward discharged Walter soon after the work was begun and did not employ another architect or superintendent.

The Court gave for the plaintiff the following instruction:

"1. The Court instructs the jury that the clause of the contract providing that the work of the plaintiff shall be done 'to the satisfaction of the party of the first part' (viz, Mr. Ward) means as a matter of law a 'satisfaction' to be reasonably and not arbitrarily exercised. In other words, in considering the evidence in this case bearing upon the question of whether or not the work was done to the satisfaction of the defendant, the jury should not consider alone the testimony of the defendant that said work was not done to his satisfaction, but should consider also all of the evidence in said case, and make up their minds from all the evidence whether the defendant in good faith, honestly and reasonably, was not satisfied with the plaintiff's work."

The defendant asked the Court to instruct the jury that if the plaintiff failed to perform his contract in accordance with the contract, drawings and specifications and the ordinances of the City of Chicago, in a good and workmanlike manner to the satisfaction of the party of the first part, they should find the issues on that question for the defendant, and also asked the Court to instruct the jury that they would be authorized to allow the defendant the amount of damages sustained by him as a necessary result of the failure of the plaintiff to perform his contract in accordance with the contract, drawings, specifications and ordinance, if they believed from the evidence that plaintiff did fail to perform his contract and finish the building in accordance therewith, etc.; but the Court refused to give the instructions asked and modified them by inserting before the words to perform in italics, in each, the word "substantially", and inserting in the first before the word satisfaction in italics the word "reasonable", and in the second before the word finish in italics, the word "substantially". We think the Court did not err in so modifying the instructions and find no reversible error in the giving or refusal of the other instructions.

The record and the briefs for appellant are voluminous. Appellant complains of nearly everything that

Erikson did and of a very large number of things which it is contended he failed and omitted to do. The recovery is more than $500 less than the amount claimed by the plaintiff. On a careful review of the evidence we cannot say that the verdict is against the evidence or that the recovery is excessive.

The record is, in our opinion, free from reversible error and the judgment of the Municipal Court is affirmed.

AFFIRMED.

331 - 18798

R. W. BAETHKE, Administrator of the Estate of JOHN BARNOWSKI, deceased,

Appellee,

vs.

THE AURORA, ELGIN & CHICAGO RAILROAD COMPANY, a corporation,

Appellant.

185 I.A. 270

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE BARRY DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment recovered by the plaintiff Administrator, in an action against the defendant railroad company for causing the death of John Barnowski, plaintiff's intestate, by negligence. A judgment on a directed verdict of not guilty in the case was reversed. Baethke, Admr. v. A. E. & C. R. Co., 163 Ill. App. 30. The facts are stated in the opinion in that case.

The grounds of reversal urged on this appeal are that the Court erred in giving instruction 5 for the plaintiff and that the verdict is so manifestly against the evidence that the judgment should be reversed and the cause not remanded.

By instruction 5 the jury were told that if they found that the plaintiff had made out his case as alleged in the first, second or fourth count of his declaration, they should find the defendant guilty. Each of said counts avers that the deceased was crossing the tracks of the defendant at, etc., and while so doing was in the exercise of due care for his own safety, and also avers that "through no fault of his own" he was struck and in-

jured, etc.

Appellant in support of the contention that it was error to give instruction 5 cites and relies on the case of Krieger v. A. N. and C. H. R. Co., 242 Ill. 544. In that case it was held reversible error to give a similar instruction. The averment respecting care and caution in that case was as follows: "While the plaintiff with all due care and caution was then riding across the said railroad"; and it was held that the averment was limited to the time when plaintiff was riding across the railroad. In this case there is in each count the additional averment that the plaintiff was struck and injured, "through no fault of his own", and we think that it cannot be held that the averment as to the exercise of care by the plaintiff was limited to the time when he walked onto the crossing so near to the rail that he was struck by the car.

Appellant asks that the judgment be reversed with a finding of fact that the deceased was not in the exercise of ordinary care for his own safety and that his lack of such care was the proximate cause of his death.

The contention of the appellee that the question whether the deceased was guilty of contributory negligence was decided on the former appeal and therefore appellant cannot be heard on that question on this appeal, cannot be sustained. Conceding that the evidence touching that point was substantially the same on each trial, the questions presented on the two appeals are different; on the first appeal the question was whether there was evidence for the plaintiff which if taken as true and the inferences most favorable to the plaintiff drawn therefrom, the jury might find a verdict for the plaintiff; on this appeal the question is whether the verdict is so clearly against the evidence that the court

should have granted a new trial.

We think that on the evidence in the record the question whether the deceased exercised proper care and caution in going so near to the rail that he was struck by the car was a question of fact for the jury, on which their verdict is conclusive. Mueller v. Phelps, 252 Ill. 630, and cases there cited. We also think that on the evidence the question whether the defendant was guilty of negligence was a question of fact for the jury on which the verdict should not be disturbed.

The judgment of the Superior Court is affirmed.

AFFIRMED.

357 - 18824

BERTHA VOEGELI,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

185 I.A. 274

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE BAKER
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment for $2500.00 rendered on a verdict in an action on the case for personal injuries alleged to have been sustained by appellee through the negligence of appellant. The only contention of the appellant is that the verdict is not justified by and is against the overwhelming weight of the evidence.

Appellee was injured in leaving a street car in Halsted street just south of O'Neil. Appellant owned the street railroad in Halsted street from O'Neil street south to 69th, and ran thereon certain street cars known as the Halsted and O'Neil Street Line. These cars ran from 69th street north in the east track to O'Neil street, thence back south to 69th in the west track. Just south of O'Neil street was a crossover, or switch, on which the cars crossed over from the east to the west track. The Chicago Railways Company also operated a line of cars from 69th street north to Division. These cars ran on the tracks of appellant as far north as O'Neil street and thence north to Division on the tracks of the Railways Co. Appellee became a passenger on a north bound car on Halsted street at 29th, a few blocks south of O'Neil, intending to go north on Halsted street beyond O'Neil. Her

nephew testified that he put appellee on a north bound car of appellant's Halsted and O'Neil street line at 29th street. Appellee testified that she rode on the car on which she was placed by her nephew until it reached O'Neil street; that the car then stopped and most of the passengers left it, but she and two or three others remained in the car; that the conductor came in the car and she heard him say to one of the other passengers who remained on the car, "This is as far as we go"; that she then got up, said, "Then I have got to get off", walked to the front door, passed through it onto the front platform, turned to the west, took hold of the support or handle with her right hand, stepped down on the step with her left foot and raised her right foot to step down to the ground, and just then the car started south with such violence that her hold was broken and she fell to the ground. Subsequent examination showed that the neck of her left femur was fractured. Robbins, the motorman, and Murphy, the conductor, of a car of appellant that ran from 69th street to Division, crossing O'Neil, testified that when their car approached O'Neil street they saw a woman, who proved to be appellee, lying on the street west of the south bound track, and carried her into a restaurant nearly opposite on the west side of Halsted street, and that she gave her name and address to the conductor.

As to the place where plaintiff was lying, whether west of the tracks or between the tracks, the evidence is conflicting, and the conductors and motormen of all of appellant's cars that reached O'Neil street from the south about the time of the accident testified that they saw nothing of any such occurrence as appellee described. Two witnesses called by appellee, Szefski and Rak, testi-

fied that they saw appellee lying between the rails and at the same time saw a car going south on the west track 50 or 60 feet south of the place where plaintiff was lying, and that they carried plaintiff into the restaurant. Guorgopoulos, the keeper of the restaurant into which plaintiff was taken, testified that "the boys" carried her into his place and a couple of minutes later the conductor came in and asked for her name. As to the other matters the testimony was also conflicting.

Appellant insists that the testimony of appellee and her principal witnesses is in material matters improbable and contradictory.

We shall not attempt to discuss the testimony in detail, but on a careful review of the testimony and the argument of counsel for appellant against the credibility of appellee and her witnesses, we cannot say that the verdict is not supported by the evidence or that it is so clearly against the weight of the evidence as to warrant us in disturbing the judgment, and the judgment will be affirmed.

AFFIRMED.

56 - 19436

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

BEN GOLDBERG,
Plaintiff in Error.

185 I.A. 285

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

On an information in the Municipal Court of Chicago charging plaintiff in error with larceny as Bailee, he was found guilty, sentenced to pay a fine of $100, and prosecutes this writ of error. The evidence in the record wholly fails to show that the offence was committed in the City of Chicago and the judgment must therefore be reversed.

Jackson v. The People, 40 Ill., 405.

In Weinberg v. The People, 208 Ill., 15, it was held that the evidence as a whole left no reasonable doubt that the act charged was committed at the place laid in the indictment and that this was sufficient proof of venue although no witness testified in express words where the offence was committed.

REVERSED AND REMANDED.

120 - 19503

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

R. B. SMITH,
Plaintiff in Error.

185 I.A. 286

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was convicted on an information filed in the Municipal Court charging him with keeping a common, ill-governed disorderly house, kept for the encouragement of drinking and fornication, in violation of Sec. 57 of the Criminal Code. We find no error in the rulings of the court on questions of evidence or instructions. The testimony of witnesses that they had not seen evidence that the house of plaintiff was being run for immoral purposes or that fornication or drinking was carried on there, was incompetent and was properly excluded. The defendant testified in his own behalf. His reputation for truth and veracity was not attacked by the prosecution, and yet he offered testimony that his reputation for truth and veracity was good and contends that the court erred in excluding such testimony. This contention is without merit. The reputation of defendant for truth and veracity was not in issue.

We think that from the evidence the jury might properly find the defendant guilty, that his motion for a new trial was properly denied, and the judgment is affirmed.

AFFIRMED.

196 - 19586

185 I.A. 287

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

EVERETT C. ELLISON,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was charged in an information filed in the Municipal Court with stealing a watch of the value of fourteen dollars. A jury was waived and the court found him guilty of larceny, sentenced him to pay a fine of two hundred dollars, but wholly failed to find the value of the property stolen. The punishment for larceny depends on the value of the property stolen; if it exceeds fifteen dollars the punishment is imprisonment in the penitentiary; if fifteen dollars or less the punishment is imprisonment in the county jail or in certain other places named in the statute and a fine of "not exceeding one hundred dollars." The court sentenced the defendant to imprisonment for six months and to pay a fine of two hundred dollars. It is settled in this State by repeated decisions that whenever the measure or kind of punishment depends on the value of the property stolen, the jury, or court when the trial is by the court, must find that value as part of the verdict or finding, and that without such finding the conviction cannot be supported. Highland v. People, 1 Scam. 392; Sawyer v. People, 3 Gil. 53; Hildreth v. People, 32 Ill. 36; Collins v. People, 39 id. 233; Williams v. People, 44 id. 478;

Tobin v. People, 104 id. 565; Thompson v. People, 125 id. 256.

The maximum fine provided by the statute being one hundred dollars, the court had no authority to impose a fine of two hundred dollars.

For the errors indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

20120

185 I.A. 288

ISABELLA E. KUHN,
Appellee,

vs.

WILLIAM J. KUHN,
Appellant.

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

MR. PRESIDING JUSTICE BAKER
DELIVERED THE OPINION OF THE COURT.

October 22, 1913, Isabella E. Kuhn filed her bill in equity against her husband, William J. Kuhn, and others. On the same day the Court ordered that a temporary injunction issue restraining defendant from collecting rent on certain real estate, from collecting money on certain notes secured by trust deed executed by certain other defendants to defendant Ray, from using vituperative or threatening language or attempting violence to or toward complainant. The injunction was ordered without notice to defendant William J. Kuhn, and from such order he prosecutes this appeal. The bill alleges that the notes mentioned in the bill were given in part payment for certain real estate owned by complainant and defendant as tenants in common and by them conveyed to the makers of said notes; that said notes were payable to the order of the makers and were endorsed by them; that complainant and defendant are the owners as tenants in common of the real estate mentioned in the bill, each owning an undivided half thereof. There is no allegation that the defendant is insolvent nor is there any prayer for partition. No fact is alleged in the bill which tends to show that defendant could have done anything which would have put the complainant in a worse position if notice of the application for

an injunction had been given him, and it was therefore, in our opinion, error to grant the injunction without notice.

If the defendant has collected money either on the notes or for rent in excess of the share thereof to which he is entitled, equity will compel him to account to complainant, but complainant is not entitled to a temporary injunction, the effect of which is to exclude her co-tenant from the enjoyment of the common property on the allegations contained in this bill. Again, the bill is clearly multifarious in that it seeks to join in one bill matters distinct and unconnected against one defendant. There is no connection between the collection of money or rent and the use of vituperative or threatening language or attempted violence by defendant to or towards the complainant.

For the reasons indicated the order for an injunction is reversed.

ORDER REVERSED.

139 - 18592

JAMES A. McINERNEY,
Plaintiff in Error,
for use of J. W. WILLIAMSON
and MARY WILLIAMSON,
Defendants in Error,

vs.

ANDREW J. GRAHAM, doing
business, etc.,
Defendant in Error.

185 I.A. 303

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

February 28, 1912, J. W. Williamson filed an affidavit in the Clerk's office of the Municipal Court, alleging that a judgment for $1275 and costs, on which there was due a balance of $975.50 debt and $9.75 costs, was rendered by the said Municipal Court on January 4, 1909, against James A. McInerney in favor of J. W. Williamson and Mary Williamson; that an execution had been issued and returned unsatisfied by the Bailiff of the Municipal Court of Chicago, and that Andrew J. Graham, doing business as Graham & Son, was indebted to the judgment debtor McInerney.

As the affidavit appears in the transcript of the record before us, the jurat reads as follows:

"Subscribed and sworn to before me this 27 day of February, A. D. 191

(Seal) John C. DeWolfe."

Because of the manifest omission to write the concluding figure of the date, and the further omission to give the official designation of DeWolfe, and the use of a wrong initial in the name of the bailiff who returned the execution, together with a discrepancy of 75 cents in the

figures used in stating the amount of the debt, the plaintiff in error in this Court contends that this affidavit failed to confer jurisdiction on the Municipal Court to entertain this suit. Of this we think it enough to say that the parties all, at one stage or another of the subsequent proceedings, were before the Court and that no objection to the jurisdiction was made below nor any suggestion made that the affidavit was not sufficient nr not properly sworn.

Under these circumstances we think the presumption here is that DeWolfe was an officer qualified to administer oaths, which is a fact capable of proof aliunde if it does not appear in the certificate and is questioned. Cox v. Stern, 170 Ill., 442.

The other objections to the affidavit do not seem to us important.

Kruse v. Wilson, 79 Ill., 233;

Commercial Nat'l Bank v. Payne, 161 Ill., 316;

Gaynor v. Hibernian Savings Bank, 68 Ill. App., 485.

A summons issued on this affidavit commanding the bailiff to "summon Andrew J. Graham doing business as Graham & Son" to appear before the Municipal Court on March 4, 1912, to answer as to the moneys, etc., in his hands belonging to James A. McInerney. This was returned by the officers as follows:

"By order of Plaintiff's attorney I have served this writ on the within named Graham & Sons as garnishee by delivering a copy thereof to N. Graham copartner and at the same time informing him of the contents thereof in the City of Chicago this 29 day of Feby. 1912 and paid him $1.10 fees and mileage.

Thomas M. Hunter,
Bailiff by George Crummett,
Deputy."

Although Andrew J. Graham was described in this suit as doing business as "Graham & Son", he was sued as the sole defendant, and it is conceded that the service of the summons "by delivering a copy to A. Graham" was invalid. Andrew J. Graham did not appear in response to the summons.

The case being of the fourth class, the cause proceeded as it might before a Justice of the Peace, without the filing of written interrogatories, and on March 4, 1912, a conditional judgment was entered by the Court which recited that the garnishee had been duly and seasonably served and had not appeared, but was in default for want of an appearance; and therefore on motion of the "plaintiff", to quote the language of the judgment order -

"It is considered by the Court that the defendant for the use of the plaintiff have and recover of and from said garnishee the sum of nine hundred ninety-two dollars and thirty-five cents, being the amount due this day on the judgment against the original defendant unless said garnishee after being duly served with a writ of scire facias to be issued herein shall show cause, if any said garnishee have, why this conditional judgment should not be confirmed and made final for said amount. It is further ordered that a writ of scire facias issue out of this Court against said garnishee as provided by law, commanding said garnishee to show cause why said conditional judgment should not be confirmed and made final."

This order was correctly entitled "James A. McInerney for use of J. W. Williamson and Mary Williamson vs. Andrew J. Graham doing business as Graham & Son", but the names are not recited in the order and the words "defendant" and "plaintiff" are used with a want of precision not commendable. The nominal "plaintiff" in the garnishee suit, in which the judgment was entered, was "McInerney", the beneficial plaintiffs were J. W. Williamson and Mary Williamson and the defendant was Andrew J. Graham. But it is evident that "defendant" is used in the judgment order for the "defendant" in the judgment on which the gar-

nishment was founded, that is, McInerney, and that "plaintiff" is by a clerical error used for the "plaintiffs" in said judgment, W. W. Williamson and Mary Williamson.

The invalidity of the service on which this conditional judgment was founded and these irregularities or ambiguities in the wording of the order itself are made the ground of argument by the plaintiff in error that the final judgment in this case, as hereinafter recited, is erroneous. We do not think so, for the scire facias on this conditional judgment issued on March 9, 1912, according to the course prescribed by statute, and summoning Graham to show cause why final judgment should not be entered against him, was personally and properly served on said Graham and he appeared and made answer on March 11, 1911. We do not think this can be called a "voluntary appearance", as plaintiff in error, McInerney, insists. The appearance to the scire facias waived any preceding irregularities in the process by which Graham was brought before the Court. Bank v. Titsworth, 73 Ill., 591.

No interrogatories were necessary under the statute, but the garnishee might have been examined by the parties orally, and for all that appears, there being no "statement of facts", "report of the evidence" or "bill of exceptions" in the record, was so examined.

However that may be, he filed an answer and afterwards an amended answer. On the amended answer a final judgment was rendered April 3, 1912, in favor of the "defendant" (by necessary intendment the judgment defendant McInerney, although it would have been better form to have named him in the order) "for the use of said plaintiffs" (necessarily the judgment and beneficial plain-

tiffs, J. W. Williamson and Mary Williamson) against the garnishee for $452.70. To reverse this judgment McInerney has sued out this writ of error.

The judgment was justified by the amended answer. The answer admitted that the garnishee had on deposit in his bank $452.70 to the credit of the garnishee, and asserted that in a suit for divorce by the wife of McInerney an injunctional order was issued by the Circuit Court of Cook County enjoining McInerney from attempting to remove the money and Graham from paying it to McInerney until further order; and that said injunction as to said $452.70 was still in force. The answer further stated that McInerney had been adjudged a bankrupt in the United States District Court; that the indebtedness on which the garnishee proceeding was founded was scheduled by him in the bankruptcy proceedings; that the Williamsons had notice of said proceedings and filed objections to said McInerney's discharge; that McInerney was not discharged; that "an injunction was issued by said bankruptcy court restricting the making of a levy on said judgment against McInerney, and that said injunction was dissolved by said bankruptcy court on February 9, 1909, and is no longer in force."

Is is maintained by the plaintiff that the judgment appears unwarranted because there is in the record no recital of evidence or finding of the judgment against McInerney in favor of the Williamsons, but in the absence of anything answering to a bill of exceptions it cannot be presumed that no evidence of this judgment, as it is recited in the scire facias, was given before the Court. Furthermore, the answer of the garnishee recites an admission by McInerney of it in the bankruptcy proceedings which it describes.

The injunction of the Circuit Court against the payment by the garnishee to McInerney of the amount on deposit, made in favor of his wife in the divorce proceedings, furnished no defense, we think, to the garnishee in this action by McInerney's creditors, whose rights were not defeated by the action of the Court in the wife's interest solely.

The judgment of the Municipal Court is therefore affirmed.

AFFIRMED.

197 - 18655

JOHN HEMWALL AUTOMOBILE CO.,
Defendant in Error,

vs.

GEORGE CASSIDY,
Plaintiff in Error.

185 I.A. 310

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

By the consideration of the Municipal Court sitting without a jury the John Hemwall Automobile Co. secured a judgment of $100 against George Cassidy on May 20, 1912. To reverse it Cassidy has sued out a writ of error, contending that the finding and judgment for the plaintiff was against the weight of the evidence.

The suit was for the breach by the defendant of a contract to purchase an automobile from the plaintiff, which was a dealer in cars.

The evidence was conflicting, the plaintiff maintaining that he sold an automobile by sample and furnished one like the sample; the defendant that he bought a particular car picked out from the plaintiff's stock and did not get it. This question was one of fact and was decided by the Court below in favor of the plaintiff. The defendant took the car and used it several times and gave a check for it for $1300, which was returned unpaid, payment having been stopped by him. He then returned the car and the plaintiff sold it for $1100 and claimed that he had been damaged to the amount of $200. The judgment was for $100, and we cannot say that we are satisfied it was against the weight of the evidence. It is therefore affirmed.

AFFIRMED.

210 - 18668

185 I.A. 311

NORTHWESTERN RAILWAYS ADVERTISING COMPANY, a corporation,
Plaintiff in Error,

vs.

EVERS AND WILLIAMS SHOE COMPANY, a corporation, JOHN J. EVERS and CHARLES WILLIAMS individually and as copartners under the name and style of EVERS & WILLIAMS,
Defendants in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

This is a writ of error to reverse a judgment of nil capiat and for costs against the plaintiff and in favor of the defendants above named, entered by the Municipal Court of Chicago May 27, 1912. The writ of error is sued out by the Northwestern Railways Advertising Company. It is unnecessary to go into the questions argued by the parties. The suit was brought as a case of the first class against three defendants, in assumpsit on a contract. The three defendants were: 1. Evers & Williams Shoe Company; 2. John J. Evers; 3. Charles Williams. Evers & Williams Company was served with process and afterward on October 9, 1911, defaulted, but although the order of default reads, "And it further appearing to the Court that said defendant Evers & Williams Shoe Co. is still in default of an appearance herein, it is on motion of the plaintiff ordered by the Court that judgment be entered herein against defendant by default for want of an appearance", there was no judgment other than this and no assessment of damages against the Evers & Williams Company, while the final judgment of May 27, 1912, was as much in favor of the Company as of the other defendants.

Williams was personally served September 30, 1911, and Evers October 24, 1911. They were neither of them defaulted nor was the suit dismissed as to either, although only Evers seems to have appeared, or filed an affidavit of defence.

The case came to trial and evidence was taken. It is expressly conceded by the plaintiff in error that the evidence showed that Williams was not liable. It made no difference under these circumstances what it showed against either the Company or Evers. To repeat the language of this Court in Decatur Fruit Growers Association of Kansas City v. Southern Railway Company, 157 Ill. App. 155, -

"At common law if several defendants were joined in an action ex contractu, and all were brought before the court by service or appearance, it was absolutely essential to the plaintiff's recovery that he should establish a joint liability; in other words, he must recover against all or none; it was not competent to enter a judgment in favor of one defendant and against another." 1 Black on Judgments, Sec. 306. "This rule has been declared and followed in a very large number of cases in this State. See cases cited in Cooper v. McNeil & Higgins, 43 Ill. App. 350, and 11 Ency. of Pl. & Pr., 848."

The judgment of the Municipal Court is accordingly affirmed.

AFFIRMED.

233 - 18695

FRED GRANDT,
Defendant in Error,

vs.

KIRKEBY-GRUNDERSTRUP SEED CO.,
Plaintiff in Error.

185 I.A. 312

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

In this cause the defendant in error in this Court made a motion on January 17, 1913, "to dismiss the writ of error heretofore issued for the reason that there is nothing presented by the record filed calling for a review by this Court". This motion was denied. Had the motion been to strike from the transcript of record the document which is entitled "Brief statement of the facts appearing upon trial of this cause and all questions of law involved in this case and the decision of the Court upon such questions of law", it is at least very doubtful whether it would not have been granted. The so-called "Brief statement" is not such a certificate as is contemplated by Section 23 of the Municipal Court Act, and if considered as a bill of exceptions it contains no certificate and raises no presumption that the evidence recited in it was all the evidence heard on the trial.

If the evidence abstracted did not furnish sufficient justification for the judgment, we should be obliged to presume that other evidence not appearing in the statement did. But even without this consideration and viewing the evidence which appears in the statement as a correct statement of all the evidence heard, we see no reason to disturb the judgment attacked by this writ of error.

The evidence for the plaintiff which was abstracted shows that a written contract was entered into by the plaintiff and defendant January 4, 1910, which by all fair intendment provided that the plaintiff agreed to buy certain onion seed from the defendant and the defendant undertook to buy the entire crop from said seed from the plaintiff; that this crop was to be delivered during October, 1910; that the plaintiff bought onion seed to the amount of $171.40 from the defendant; that the plaintiff delivered a part of the crop to the defendant in October and received a credit of $116.32 therefor, leaving a balance of $55.08 due from him to the defendant on this account; that he made a tender of the other onions in his crop by offering to deliver them; that the defendant refused to receive them at that time and told plaintiff that he would be notified when the defendant could receive them; that not receiving notice for sometime he made inquiries from the defendant and again received instructions to postpone delivery until notified; that he stored as many onions as he could in his cellar; that those he had no room for therein or elsewhere were frozen and destroyed, and that there was no market for onions where the plaintiff lived. The amount of onions thus lost by the plaintiff was 225 bushels. The price set on them by the contract of 90 cents a bushel would amount to $202.50. Crediting the offset of $55.08 on this amount would leave $147.42, and for this sum the Municipal Court, sitting without a jury, gave judgment, finding, as the statement says,-

"That the defendant was liable for the contract price of the onion sets which were lost by being frozen", but holding that the plaintiff "could not recover anything for those which were stored in the cellar, as he should have tried to reduce the damages by finding a market for them."

We see, as we have said, no reason for disturbing this judgment. It is affirmed.

AFFIRMED.

347 - 18814

185 I.A. 314

APPEAL FROM THE SUPERIOR COURT OF COOK COUNTY.

F. G. LANCASTER,
Appellee,

vs.

WESTERN STONEWARE CO.,
a corporation,
Appellant.

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

The recital in the condition of the appeal bond in this case containing a description of the judgment below and the appeal is this:

"The condition of the above obligation is such that whereas the said F. G. Lancaster did on to-wit, the first day of March, A. D. 1912, in the Superior Court of Cook County in the State aforesaid and of the February Term thereof, A.D. 1912, recover a judgment by default against the above bounden Western Stoneware Company by default for want of a plea, for the sum of Seventeen Hundred Seventy and 42/100 Dollars and costs of suit, from which said default and judgment and motion to set aside said default and judgment and a motion for a rehearing of said motion to set aside said default and judgment of said Superior Court, the said Western Stoneware Company has prayed for and obtained an appeal to the Appellate Court", etc.

An appeal from a judgment by default is intelligible; one from "a default", "a judgment", "a motion", and "a motion for a rehearing of said motion" is somewhat of an anomaly. But treating the matter before us practically as an attack on the order of default, on the judgment following it, and on the orders respectively refusing to set aside said default and judgment, and denying a vacation of, or rehearing on, said last order, and treating it theoretically as an appeal from the judgment alone, the reversal of which with the remandment of the case is what the appellant desires, - we have no difficulty in disposing of it.

As counsel for appellant concedes in argument, it is asking for this reversal on the sole ground, as he expresses it, "of an abuse of discretion or rather an omission

of sound judicial discretion."

Passing by the question whether the counter affidavits of the plaintiff, read at the hearing of the motions referred to without objection or exception, could be properly considered on the question of whether the defendant had a meritorious defence, and assuming, as counsel for defendant maintains, that a prima facie case of a meritorious defence must be considered to have been made by affidavits which generally deny the employment by defendant of the plaintiff for legal services, - on which alleged employment his suit is based - the question remains whether the default should have been entered, or when entered should have been set aside. The default and judgment following it were justified if the defendant was guilty of negligence in pleading.

The plaintiff filed his declaration November 17, 1911. The defendant filed a plea to the jurisdiction December 4, 1911. The plaintiff replied December 6, 1911. The Court overruled the plea in abatement February 9, 1912, and at the same time ruled the defendant to plead within twenty days from that date. On March 1, 1912, which was the twenty-first day thereafter, the defendant had not plead and the default complained of was entered and the judgment followed. According to the recitals of the judgment order the assessment of damages was made by the Court "after hearing all the allegations and proofs submitted herein."

The defendant was present by counsel when the default was entered and objected thereto and moved the Court for a further time of ten days in which to file a plea. This was denied. Counsel then asked leave to file a plea instanter. A motion to vacate the default and judgment and a motion for a rehearing of said motion were made thereafter and supported by affidavits and opposed by counter affidavits and denied.

The only excuse given for the neglect to plead within the time allowed by the Court was the fact that one of the two attorneys of record for the defendant "had been engaged in court upon important cases all of the time since the rule was entered", and that he had been misled by the plaintiff into believing that no advantage would be taken of his failure to plead within the specified twenty days.

This last ground was denied in the counter affidavits filed by the defendant. We think the whole matter was fairly within the discretion of the Court below. The case does not differ materially from that of Schultz v. Meisalbar, 144 Ill. 26. We cannot say in this case, under the facts disclosed, any more than the Supreme Court in that case could, "that the ruling of the Court below in refusing to set aside the judgment was unjust and oppressive", and therefore in this case, as in that, "its judgment must be affirmed."

AFFIRMED.

65 - 19446

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

PATRICK O'MALLEY,
Plaintiff in Error.

185 I.A. 315

ERROR TO THE MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

The plaintiff in error, Patrick O'Malley, was charged by information in the Municipal Court with keeping his saloon open on a special election day within one mile of the place of holding an election, in violation of the statutes of Illinois. He waived a trial by jury and submitted his cause to the court, which found him guilty and fined him twenty-five dollars. We do not think there was evidence to justify this conviction. There is really none that the place was "open" in the sense manifestly used by the statute. The witnesses for the People were three police officers, who swore that they entered the saloon by a side entrance at about 1 P. M. and found O'Malley and four other men inside, but that O'Malley was standing in front of the bar and the others sitting by the stove and that there were no indications that drinks had been served or were to be served. There were no glasses on table or bar. Moreover they all testified that the door was locked and was unlocked for them by somebody on the inside when they demanded admittance.

The witnesses for the defence were O'Malley and the four men who were in the saloon with him when the officers entered and two others whom the officers themselves let in afterwards. They corroborated the testimony of the officers as to the fact that there were no drinks sold or served, and their testimony showed that the officers had

demanded entrance by virtue of their authority. It also explained their own presence in the dram shop. O'Maily himself, who lived above the saloon, swore that the doors were all locked, that two of the four men present when the officers came had their place of business in the basement below and came up, one to use the telephone and the other the toilet, and that the other two roomed in the building and received their mail at the saloon, and that they had come to inquire for mail and stayed to warm themselves by the stove.

The others corroborated this and there was nothing contradictory of it in the evidence for the people.

The judgment of the Municipal Court is reversed.

REVERSED.

207 - 18665

185 I.A. 318

MINNIE J. CHRISTIANSEN, Defendant in Error, vs. JAMES R. NAVIGATO and JOSEPH DEL RE, Plaintiffs in Error.	Error to Municipal Court of Chicago.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Minnie J. Christiansen, plaintiff, a tenant of defendants, in walking in the passageway leading to the rear flat occupied by her, stepped on a board in the walk which broke, thereby injuring her ankle. She sued her landlords and had judgment for $300.

It is sought to have this judgment reversed upon the ground that plaintiff was guilty of contributory negligence as a matter of law. The facts do not seem to be in dispute, but it does not necessarily follow from this that the question of contributory negligence is one of law. Not only must the evidentiary facts be undisputed, but all reasonable minds must agree as to the conclusion to be drawn therefrom before such a question can be said to be one of law.

The facts which are said to prove contributory negligence on the part of the plaintiff are as follows: She had been a tenant of a flat in the rear building for about 22 months before the time of the accident. This rear building was reached from the street by means of an old wooden walk or passageway running from the front sidewalk. This walk was in a defective condition, the boards being loose and rotten, and had been in that condition for about a year prior to the time of the accident. Plaintiff used the walk practically every day, and on the day of the accident had been over it two or three times, and knew its condition.

About ten or twelve days prior to the accident she had complained to one of the defendants regarding the walk and had asked him to fix it. She had told him that her baby had fallen down twice, and that it was hard to get the baby-buggy over the walk because the boards were loose. No promise to repair was made.

The Illinois cases cited in support of defendants' contention are not strictly in point, although language somewhat applicable to the present case may be used in the opinions. In Helbig v. Slaughter, 95 Ill. App. 623, the judgment was reversed on the ground that the injured person was a servant of the party obligated to keep the premises in repair, and that the servant, knowing of the dangerous condition of the walk, and being bound, in the discharge of his duties, to report this to his master, by his failure to do so violated his duty and therefore became guilty of contributory negligence. In Martin v. Surman, 116 Ill. App. 282, the defective place was a part of the demised premises which the landlord was under no obligation to keep in repair, and where the person injured recklessly exposed herself to the hazard of an accident. What is said by the courts of other states cannot prevail against the decisions of our own courts.

It is not contributory negligence <u>per se</u> to walk upon a sidewalk knowing it to be defective. City v. Chamberlain, 104 Ill. 268; Horaburda v. City, 154 Ill. App. 627. Knowledge of the defective condition is simply a circumstance to be considered by the jury in determining whether plaintiff was using ordinary care for her own safety. City v. Chamberlain, <u>supra</u>; City v. Cosgrove, 126 Ill. App. 627.

At the time of the accident in question plaintiff was returning to her home, about 9:30 o'clock in the evening; it was dark; this walk was the only passageway by which she could reach her dwelling. A neighbor was walking slightly ahead of her, wheeling a baby-buggy, while plaintiff was carrying the baby in her arms.

She tripped on a loose board, which caused her to fall forward, stepping heavily upon one of the boards which broke. Under such circumstances it was proper for the jury to determine whether or not she was in the exercise of ordinary care for her own safety, and it was not error for the court to refuse to instruct the jury to find the defendant not guilty.

The judgment is affirmed.

AFFIRMED.

299 - 18761

THE WM. DOERFLINGER CO.,
Defendant in Error,

vs.

E. E. SEYMOUR,
Plaintiff in Error.

185 I.A. 325

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

In this case, by order entered December 30, 1912, the statement of facts has been stricken from the transcript of the record. We have therefore before us only the common law record.

Plaintiff in error argues concerning some action of the trial court on a motion claimed to have been made to require plaintiff to file a bond for costs. No such motion appears in the record, and no action of the court thereon.

It is also argued that it was error for the court to refuse to dismiss the case for failure to prove that the plaintiff was a corporation. No motion to that effect appears in the record, and even if it did we would not be able, in the absence of any statement of facts, to conclude that the court ruled incorrectly.

Finding no errors in the record, the judgment is affirmed.

AFFIRMED.

363 - 18830

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. CATHERINE MURPHY,
Appellee,

vs.

EDWARD FROWLEY,
Appellant.

185 I.A. 338

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in a bastardy case, tried by the court. The only witnesses testifying were the complaining witness and the defendant. The complaining witness was twenty-five years of age, and had given birth to a child some three years before the birth of the child whose paternity she charges upon the defendant. She testified to two occurrences of improper relations with him, and says that she submitted because of his threats to kill her. The second occurrence was over a month after the first, and took place at a hotel where she had met him by appointment.

The defendant denied ever having knowingly seen the complaining witness until several months after the time when she claims to have been with him. He was a street car conductor, and testified that he first saw her upon his car, at which time she charged him with being the father of her unborn child and demanded that he should give her fifteen dollars; that he replied, "What is the matter with you? Are you crazy?" to which she replied, "If you aint the fellow you look very much like him." The defendant also testified that on account of an injury received by him many years before this time it was physically impossible that he should be the father of a child, and he

offered to submit himself for examination to any doctor whom the court might select.

The complaining witness testified that a card was handed her by a boy, with some message for her from the defendant written upon it; that the name on the card was "Moore." Thereupon the court had the defendant write upon another card and sign the name "Moore." Apparently the court was influenced towards his decision by the result of his comparison of the handwriting on the two cards. Only one card is in the stenographic report before us, and it is not clear which of the two it is; but this is not important, for it is the rule that the genuineness of a signature cannot be proved by comparison with other admittedly genuine handwriting or signatures not admissible in evidence for other purposes, and not already a part of the record. Stitzel v. Miller, 250 Ill. 72.

In a case of this kind the complaining witness is bound to prove her claim by a preponderance of the evidence; and she not only failed so to prove her claim, but the greater weight of the evidence rather preponderates upon the side of the defendant.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

431 - 18900

JOHN D. CASEY, Adm'r of the Estate of WILMER EBERL, Dec'd, Appellee,

vs.

KNICKERBOCKER ICE COMPANY, Appellant.

185 I.A. 339

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Wilmer Eberl, fourteen months old, while playing in the street was struck and killed by a wagon of the Knickerbocker Ice Company, the defendant. The administrator of the infant's estate brought suit and had judgment for $1,700, from which the defendant appeals.

The testimony tends to show that the accident happened while the father of the child was not at home and the mother was busy with her household duties in the house. They had no yard in which children could play, and an older sister, Margaret, age nine, had received permission from the mother to take the baby, Wilmer, out to play on a sand pile nearby. This sand pile was alongside of the west side walk of the street, which street ran north and south. The pile was about two feet high and extended from the curb of the west sidewalk easterly into the street six or seven feet. The roadway at this point is approximately thirty feet from curb to curb. It was shortly after five o'clock of a July evening. The two Eberl children, with about ten or twelve children of the neighborhood, were playing in the sand pile, when Wilmer, who was just learning to walk, started away from the pile in a northeasterly direction. At this time the defendant's team and ice wagon came from

the south, the horses at a fast trot and driven upon the west side of the street. When they were about three or four feet from the sand pile the child was struck and knocked down by the near horse and thrown under the wheels and so injured that she died. The driver was on the west end of the wagon seat in front, with two other men on the same seat at his right. They were talking together. Several persons in the street, seeing the impending accident, shouted warnings to the driver and called upon him to stop his team. He did not heed these cries, explaining afterwards that he thought they were cries from persons wanting ice and "we did not have any." The wagon continued northward after the child was struck, going about seventy-five feet when a man running out from the sidewalk caught the horses by the bridle and stopped them. Apparently neither the driver nor the others on the wagon knew of the occurrence until they were told.

Plaintiff was permitted to amend his declaration by changing the averment that the infant was in the exercise of due care for her safety, to an averment that the parents were in the exercise of such care. To this amended declaration defendant filed a plea of the statute of limitations, to which plea plaintiff demurred, which demurrer was sustained. The demurrer was properly sustained. The amendment did not state a new cause of action. Chicago City Ry. Co. v. Cooney, 195 Ill. 466.

It is urged that the judgment cannot stand because of the failure of plaintiff to aver that the older sister, Margaret, was in the exercise of due care for the safety of her sister while in her custody. Without deciding whether such averment was necessary, it is sufficient

to say that this question cannot be raised at this time. By repeated statements to the court and jury, counsel for the defendant stated in substance that plaintiff was bound to prove two points, namely, that the parents were in the exercise of due care for the child, and the negligence of the defendant. The point as to due care presented to the jury in defendant's opening statement was whether the parents were free from contributory negligence "in leaving the child knowingly to go upon a public street in the custody of no one but a little girl eight years old." This same point of alleged parental negligence was emphasized and repeated in instructions to the jury, given at the request of the defendant. Nowhere do we find any suggestion or point made upon the trial, by motion or otherwise, indicating that the conduct of the sister, Margaret, was thought to be a material issue in the case. The case was tried upon the theory that the question of contributory negligence involved solely the conduct of one or other or both of the parents. The defendant cannot raise a new matter of defense for the first time upon appeal.

The finding of the jury upon the facts being fully justified from the evidence, and there being no prejudicial errors either in the giving or refusing of instructions or in the rulings upon evidence, the judgment is affirmed.

AFFIRMED.

61 - 19441

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

WILLIAM SWEENEY,
Plaintiff in Error.

185 I.A. 340

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant, Sweeney, was found guilty of vagrancy. The trial court found from the evidence that he came within the description of a vagrant, as set forth in section 270 of chapter 38, Criminal Code, Illinois Statutes, but we do not think that the evidence justifies this finding. An essential ingredient of the offense of vagrancy is that the person charged shall have "no lawful means of support" and shall be "habitually found prowling around any steamboat landing, railroad depot * * * store, shop or crowded thoroughfare, car or omnibus," etc. Three police officers testified on behalf of the people that the defendant was a thief, but as to whether or not he had any lawful means of support they had no knowledge. There is no evidence whatever that defendant was habitually found prowling around any of the places named in the section of the statute. On behalf of the defendant it was shown that he was a married man, living with his wife and children and his mother; that he worked in a gang of laborers employed by the Chicago & Northwestern Railway for several months immediately prior to his arrest, and that he worked on the day of his arrest until noon; that he was arrested while sitting in a cigar store about four o'clock on Saturday afternoon.

The people not only failed to prove essential

elements of the crime of vagrancy, but the undisputed evidence as to defendant's employment shows conclusively that he should have been discharged by the trial court.

The judgment is reversed.

REVERSED.

157 - 19546

185 I.A. 341

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

CHARLES WARREN, alias CLARENCE WARREN,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McGURNEY DELIVERED THE OPINION OF THE COURT.

The defendant, Warren, was found guilty upon trial by the court of the crime of vagrancy. Several points are made by the plaintiff in error which we consider to be without merit. We have decided, however, to reverse this judgment and remand the case, for the reason that we are not satisfied that the people proved beyond a reasonable doubt that defendant was guilty.

An essential element of the crime of vagrancy is that the person charged should be without lawful means of support and that he shall be habitually found prowling around certain public places, specified in the statute. See section 270 of chapter 38, Criminal Code, Statutes of Illinois. The evidence of the police officers testifying in this case is vague and uncertain and consists for the most part of conclusions. There was no affirmative evidence that defendant was without lawful means of support; the evidence upon this point is wholly negative, the witnesses simply testifying in substance that they had no knowledge upon this point. If it is a fact that defendant has no lawful means of support, it would seem that witnesses who have knowledge of the fact should testify. This fact must be shown affirmatively, like any other necessary element of a crime.

The evidence having failed to prove defendant guilty of the crime charged beyond a reasonable doubt, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

158 - 19547

185 I.A. 342

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

CHARLES NORTON, alias JAMES NORTON,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

The defendant, Norton, was found guilty upon trial by the court of the crime of vagrancy. Several points are made by the plaintiff in error which we consider to be without merit. We have decided, however, to reverse the judgment and remand the case, for the reason that we are not satisfied that the people proved beyond a reasonable doubt that the defendant was guilty.

It is an essential element of the crime of vagrancy that the party charged should be without any lawful means of support. The witnesses testifying for the people did not undertake to state, of their own knowledge, whether or not this was true of the defendant, except one witness, who testified that the defendant owned or operated a number of peanut machines in saloons, and that defendant filled the machines with peanuts every few days and gathered the money out of them; that there were probably fifty or so of such machines in defendant's charge. It would seem from this that the only affirmative evidence touching defendant's means of support shows that he did have a lawful business. In order to establish vagrancy it must be affirmatively proved by the people that the defendant is without lawful means of support, and such proof does not appear in this case.

The judgment is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

434 - 18901

GERMAN AMERICAN SAVINGS, LOAN AND BUILDING ASSOCIATION et al.,
Appellants,

vs.

JOHN C. TRAINOR,
Appellee.

185 I.A. 345

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

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433 - 18903

GERMAN AMERICAN SAVINGS LOAN AND BUILDING ASSOCIATION et al.,
Appellants,

vs.

JOHN C. TRAINOR et al.,
Appellees.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

The original complainant, German American Savings, Loan and Building Association, organized under the act entitled "An Act to enable associations of persons to become a body corporate to raise funds to be loaned only among the members of such association," in force July 1, 1879, filed its bill against the defendant, John C. Trainor, and others, to foreclose certain mortgages executed by the defendant Trainor in favor of one Ernst Amson as trustee. The bill set up that while the complainant was doing business in pursuance of its organization, the defendant, John C. Trainor, on or about September 24, 1890, made application for a loan of $8600 to the complainant association; that he subscribed for 88 shares of the stock of the association, executed a trust deed described in the bill, assigned his certificate of stock to the association as security therefor, and received from the association the sum of $7040, being the amount applied for

and for which the trust deed was given less 20% premium charged by the complainant.

On or about January 5, 1891, the defendant Trainor applied to the complainant for a further loan of $3200, and subscribed for and took out 32 shares of the capital stock of said company, which he assigned to the complainant as security for the loan and executed and delivered a trust deed and obtained from the association the sum of $2560, the amount of the loan less 20% deducted for premium by the complainant.

On February 16, 1891, the defendant Trainor applied to the complainant for a further loan of $1400, and subscribed for 14 additional shares of the stock of the complainant association and assigned the stock to the complainant as security for the loan, and executed and delivered a third trust deed, receiving from the complainant the sum of $1120, being the amount applied for less 20% deducted for premium.

These three loans constitute the basis of the claims for which the foreclosure is prayed in the bill.

The cause was referred to Master in Chancery Cooper, who made a report to the court after hearing evidence. This report was afterwards set aside and the cause was re-referred to Master in Chancery Hummer, who also made a report which was confirmed and a decree entered thereon. This decree was reversed by the Supreme Court in Trainor v. German American Building Association, 204 Ill. 616. Upon the cause being redocketed, it was referred to Master in Chancery Leaming to take further evidence and report, and by stipulation the master was authorized to take into consideration all the testimony theretofore taken in the cause before the other masters. Master Leaming took additional testimony which was certified to and filed with the clerk of the court and become a part of the record in the cause, and, upon Master Leaming's death, the cause, together with all the

evidence theretofore taken, was referred to Master Ellis, who took evidence and made the report upon which the decree now before us is based.

The decree, after finding the various loans above mentioned and the trust deeds delivered as security for the same, finds that at the time of the making of those loans the complainant, without competitive bidding as provided by law, deducted from each of the loans a premium of 20% thereof and charged the defendant Trainor 6% interest upon the loans including the amount deducted therefrom, and that the deduction of the premiums in the manner shown by the evidence was made in violation of the statute and was usurious as to each of the said three loans, and that the complainant can legally demand of the defendant Trainor only the actual amount paid to the defendant, namely,- upon the loan of September 24, 1890, the sum of $7040; upon the loan of January 5, 1891, the sum of $2560, and upon the loan of February 16, 1891, the sum of $1120, and that while the three loans aggregated $13,400, the defendant received thereon only the sum of $10,720, the complainant having deducted as premiums the sum of $2680, and that the defendant Trainor ought to pay no other or further sum than the said sum of $10,720, together with such insurance upon the premises described in the trust deeds as was paid by the complainant with interest thereon from the date of payment, and such taxes as were paid upon the premises by the complainant with interest thereon from the date of payment, and that said sum of $10,720 and the insurance, taxes and interest thereon paid by the complainant aggregated $11,559.46.

The decree further finds that the defendant, John C. Trainor, had paid to the complainant upon the loans the sum of $8734.83 in cash, and that his stock earnings in the said complainant association aggregated $2851, and that Trainor was, therefore, entitled to a credit for the sum of $11,585.83, which

is $28.34 in excess of the aggregate amount owing to the complainant. The decree then finds the equities with the defendant Trainor and that his obligations have been fully discharged, and decrees that the bill of complaint and amended bill of complaint be dismissed for want of equity; and further decrees that the complainant and Henry C. Bartling, liquidator of said complainant, or the said Ernst Ammon, trustee in the trust deeds mentioned, cause release deeds to be executed upon each and all of the several trust deeds mentioned, and deliver the same to John C. Trainor, defendant, and in case the said releases are not made, authorizes and empowers John W. Ellis, Master in Chancery of the court, to execute the said releases for and in the name of the complainant and Henry C. Bartling, liquidator of the complainant, and in the name of Ernst Ammon, trustee, aforesaid, and cause the same to be delivered to John C. Trainor, defendant.

The assignments of error raise the question whether or not complainant should be allowed interest on the sums of money loaned to defendant, John C. Trainor, including the sums reserved on each loan for premiums. This is the principal question to which the arguments of counsel are directed.

The evidence in the case is exceedingly voluminous and for the most part it is quite unsatisfactory. The master excluded from consideration the books of the complainant which were offered in evidence upon the ground that they were not books of original entry and the proper foundation for their admission in evidence had not been laid. From the best evidence produced, the master found, and the court confirmed the finding, substantially as above stated, and stated the account between the complainant and John C. Trainor upon the basis above indicated, denying to the complainant any credit for interest on the $10,720, which it had actually advanced to the defendant Trainor, upon the ground

that in deducting from each loan 20% thereof for premiums, without offering the loans to the highest bidders as provided by law, the loans were usurious and the complainant was not entitled under the law to interest thereon.

The fact that when each of the three loans was made a 20% premium was deducted without offering the loans to the highest bidders as provided by law, is not in controversy in the evidence. The association had a by-law providing for a 20% premium to be deducted from all loans, and the loans in question were made under provisions of such by-law. The by-law was, in our opinion, illegal and the loans made in this case, as shown by this record, were usurious. The decree, finding the loans to be usurious and stating the account upon the basis that they were usurious and enforcing the forfeiture of all the interest upon the complainant below, is not erroneous. Harris et al. v. Bressler et al., 119 Ill. 467; Free Home Building Association v. Edwards, 223 id. 126; Fowler v. Equitable Trust Co., 141 U. S. 384.

Upon a study of the record we find no clear ground for reversing or modifying the decree. The decree is affirmed.

AFFIRMED.

26 - 19005

CAROLINE WOLFF, individually and as Trustee under the last will and testament of FREDERICK WOLFF, deceased,
Defendant in Error,

vs.

ANTHONY JURGENSON,
Plaintiff in Error.

185 I.A. 346

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

The defendant in error, Caroline Wolff, commenced an action of forcible detainer against the plaintiff in error, Anthony Jurgenson, in the Municipal Court of Chicago, to recover possession of certain real estate.

The complaint is in the usual form, alleging that the defendant in error, individually and as trustee under the will of Frederick Wolff, deceased, is entitled to the possession of the said premises, and that Anthony Jurgenson unlawfully withholds the possession thereof from the defendant in error. On the return of the summons, plaintiff in error appeared and demanded a trial by jury. The case was afterwards tried before a judge and jury, and at the close of the plaintiff's case, the plaintiff in error moved the court to instruct the jury to find the plaintiff in error not guilty, and submitted to the court an instruction in writing to that effect. The court refused to give the instruction and the plaintiff in error abided by his motion to so instruct the jury and rested his case. Thereupon the defendant in error, plaintiff below, moved the court to instruct the jury to find the issues for the plaintiff, to which motion the defendant objected on the specific ground that the

plaintiff had failed to make out a prima facie case. The court overruled the objection.

The jury returned a verdict finding the defendant below guilty of unlawfully withholding from the plaintiff possession of the premises described in the complaint, and that the right of possession was in the plaintiff. Motions for new trial and in arrest of judgment were overruled and judgment was entered on the verdict.

The plaintiff to recover must show that she had the actual possession of the premises upon which the forcible entry is alleged to have been made. The mere constructive possession, such as a fee simple title to the land entered upon draws to it, is not sufficient. The title is not in any sense involved, but simply whether the plaintiff had the possession at the time the defendant unlawfully invaded it and detained it (Thompson v. Sornberger, 5[illegible] Ill. 326).

The evidence does not show that the plaintiff was ever in possession of the premises, nor is there any evidence that the defendant ever made any forcible entry upon the premises in question, and there is no evidence that at the time the defendant entered into possession of the premises in question they were vacant and unoccupied. There is no evidence as to when or how the defendant acquired possession of the premises. The proof, therefore, fails to establish a right of action in the plaintiff against the defendant for forcible entry and detainer, under either clause of the statute. The court, therefore, erred in overruling the motion of the defendant to instruct the jury to find him not guilty of unlawfully withholding possession of the premises.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

27 - 19606

185 I.A. 347

CAROLINE WOLFF, individually and as Trustee under the will of FREDERICK WOLFF, deceased,
Defendant in Error,

vs.

ANTHONY JURGENSON,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

Caroline Wolff, defendant in error, brought an action of forcible detainer against Anthony Jurgenson, plaintiff in error, in the Municipal Court of Chicago. The complaint filed was as follows:

"Caroline Wolff, individually and as trustee under the will of Frederick Wolff, deceased, complains to the Municipal Court of Chicago that she, the said Caroline Wolff, individually and as trustee under the will of Frederick Wolff, deceased, is entitled to the possession of the following described premises in the city of Chicago, to-wit: Lot 32 in Owner's subdivision of part of east half of Lot 17 in Snow estate subdivision in Section 30, Township 40 North, Range 14 East of the third principal meridian, according to map recorded May 7, 1909, as Document 4,371,114, in Book 102 of Plats, page 43, being the lot situated at the northwest corner of Fletcher street and the first alley west of North Robey street, Chicago, Illinois, and that Anthony Jurgenson unlawfully withholds the possession thereof from the said Caroline Wolff, individually and as trustee under the will of Frederick Wolff, deceased.

Wherefore she prays a summons in pursuance of the statute in such case made and provided.

Dated August 21st, A. D. 1918.

John Leo Fay,
Attorney for plaintiff."

The only question involved in this case is the sufficiency of the complaint under the statute. The point is made that the complaint was neither signed by the defendant in error in person, nor was her name signed thereto by an agent or attorney.

No question seems to have been made or preserved in the court below as to the sufficiency of the complaint. We re-

gard the sufficiency of the complaint as settled by the case of Patterson et al. v. Graham, 140 Ill. 531. The same contention was there made as is made here, and it was held to be without force. The complaint is a mere pleading and no sound reason is perceived or suggested why it should be signed by the complainant in person rather than by an agent or attorney.

In Leary v. Pattison, 68 Ill. 703, the court said:

> "The objections urged against the sufficiency of the complaint should have been taken on a motion to quash. No such motion was made, and the defects, if any exist, cannot be taken advantage of on the thial, or for the first time in this court. Brown v. Keller, 3[illegible] Ill. 151; Jackson v. Warren, 3[illegible] Ill. 331."

The judgment is affirmed.

AFFIRMED.

48 - 19034

185 I.A. 348

INDUSTRIAL MANUFACTURING COMPANY,
Defendant in Error,

vs.

SIMON DEUTSCH and EDWARD L. GROSS,
co-partners doing business as
ELECTRO-MECHANICAL ENGINEERING
COMPANY,
Plaintiffs in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error, hereinafter called defendants, and the defendant in error, hereinafter called the plaintiff, entered into the following agreement in writing:

"This agreement made and entered into this 30th day of January, 1911, by and between the Industrial Manufacturing Company of Chicago, Ill., party of the first part, and the Electro-Mechanical Engineering Company of the same place, party of the second part, witnesseth:

That the said first party agrees to manufacture and build all the required parts, and assemble one automatic wire pin machine for making Reed's Slide Lock Safety Pin, as shown on the blueprints Nos. 1 and 20 inclusive, to be furnished by the party of the second part.

The party of the first part reserves the right to make any such change as can be mutually agreed on without changing the fundamental principles of the operation of the machine, or sacrificing the stability of the machine, and also reserves the right to call upon the said second party for any assistance they may need to clearly understand any of the blueprints as furnished by said second party.

The said first party agrees to have finished and ready for delivery said machine in thirty (30) days from the date of this agreement, unless any of the fundamental ideas prove to be in error. The said first party is then to be granted ample time in which to make the necessary changes for which said first party is to receive in addition to the contract price of $650 (six hundred and fifty dollars) whatever amount of compensation that may be mutually agreed upon.

The said party in consideration of the sum of $650 (six hundred and fifty dollars) also agrees that this machine and all parts thereof shall be assembled and adjusted complete in every respect by them, and shall make pins of the shape and size as per sample submitted, provided, that none of the fundamental ideas or principles incorporated in the drawings by party of the second part, prove to be in error.

The said second party is to pay the said first party 25% (twenty-five per cent) of the contract price or $162.50 (one hundred and sixty-two dollars and fifty cents) on acceptance of this contract and the balance of contract price

or $487.50 (four hundred eighty seven dollars and fifty cents) on acceptance of said machine.

The said first party is not and cannot be held responsible by this contract for any delays caused by fires, strikes, or any other cause over which they have no control."

The defendants paid on the contract $162.50. The record shows that on or before May 1, 1911, the plaintiff completed the machine according to the blueprints furnished by the defendants and their oral instructions given from time to time. When the machine was completed it would not make pins as per sample submitted.

The plaintiff contended in the trial of the case that the failure of the machine to make pins was due to error in fundamental ideas or principles incorporated in the drawings of the defendants and this was denied or controverted by the defendants.

After May 1, 1911, the defendants made no further changes and furnished no ideas for the further construction or redesigning or making necessary changes on the machine. The plaintiff, having completed the machine according to the blueprints and oral instructions of the defendants, sued to recover the balance of the contract price of $487,50, and also $207 claimed as extras, which the evidence tends to show the defendants agreed to pay.

The jury returned a verdict for $694.50, the full amount of plaintiff's claim.

It is conceded by the defendants and the record shows that the plaintiff completed the machine in question according to the blueprints of the defendants and the oral instructions of the defendants, and that the machine, when so completed, did not make pins like the sample submitted. The defendants contended before the jury that the failure of the machine to make pins was not due to error in fundamental ideas or principles incorporated in the drawings of the defendants, but that the defects were

minor ones which should have been corrected by the plaintiff. On the other hand, the plaintiff claimed there were errors in the fundamental ideas or principles incorporated in the drawings of the defendants, and that such errors were responsible for the failure of the machine to make pins. This was a question of fact for the jury and was submitted to the jury by the court by instructions. The record shows that subsequently to May 1, 1911, when the machine was completed, the defendants made no changes and furnished no ideas for further construction of the machine, and that the plaintiff at no time refused to make any change on the machine suggested by the defendants, but made all such changes.

Error is predicated on that part of the court's oral instructions which was as follows:

> "The court instructs the jury that if you believe from the evidence in this case that the plaintiff manufactured, built and assembled the machine in question according to the blueprints furnished by the defendants, and the oral instructions of the defendants, if any; and if the jury believe further that the failure of the machine to make pins as per sample submitted was on account of errors in the fundamental ideas or principles incorporated in the drawings of the defendants, and not through any fault of the plaintiff, then the jury is instructed as a matter of law that the plaintiff was relieved from its agreement that the machine would make pins of the shape and size of the sample submitted."

It is urged that this instruction was directory. We do not think it was. The jury had to determine whether the plaintiff manufactured the machine according to the blueprints of the defendants, and whether the failure of the machine to make pins was due to error or errors in the fundamental ideas or principles in the drawings, and whether the failure was through any fault of the plaintiff. These facts were submitted to the jury and passed upon by it.

We think it clear that the contract contemplated that there might be errors in the fundamental ideas or principles incorporated in the drawings, and that the charge of the court to the jury covered that contingency. We find no reversible error in

the charge to the jury.

It appears from the record that when the machine was completed, and Raleigh, president of the plaintiff, asked for the balance of the money under the contract, the defendants told him that they could not pay the balance until they got some money from the party for whom they were building the machine; that this party would pay as soon as the machine made pins, and as soon as they got the money from him they would pay the plaintiff; and that one of the defendants, Gross, asked Raleigh to make up some pins by hand to send to said party so as to get some money. None of these facts were denied by the defendants. In our opinion the record shows facts justifying the jury in finding that the plaintiff had fulfilled its part of the contract when the machine was completed, and that the failure of the machine to make pins was due entirely to errors in the design of the defendants.

The contract provided that the plaintiff was to be allowed extras in case there was error in the fundamental ideas or principles of the drawings. There is nothing in the contract prohibiting the plaintiff from recovering for work which the defendants specifically agreed should be considered as extras, and the evidence in the record tends to show that all of the items sued for in the list of extras attached to a copy of the contract filed in the Municipal Court were furnished by the plaintiff. Under the contract and the facts shown by the record, the doing of the extra work by the plaintiff on request by the defendants entitled the plaintiff to recover for the extra work.

The plaintiff was in no way responsible for the failure of the machine to make pins, and, having completed the machine according to its contract, it was entitled to recover the contract price and the extras agreed to by the defendants. The additional abstract of record is ordered taxed to plaintiffs in error.

The judgment is affirmed.

AFFIRMED.

82 - 19073

C. F. LUND, for the use of
J. E. RICHARDS,
Defendant in Error,

vs.

THE DOLE VALVE COMPANY,
Plaintiff in Error.

185 I.A. 350

Error to
Municipal Court
of Chicago.

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

Plaintiff below, defendant in error here, on June 28, 1913, filed an affidavit in garnishment in the Municipal Court of Chicago, and a summons was issued and served upon the defendant below, plaintiff in error here, the Dole Valve Company, as garnishee, returnable July 10, 1913. No interrogatories were filed.

On the return day, the time to answer was extended and on July 16th, the defendant filed its answer, setting up that there were no rights, credits, etc., in its hands belonging to said C. F. Lund, and were not at the date of commencement of the suit except as stated; that at the time of the commencement of the suit there was due and owing from the defendant, on account of wages, salary or compensation of C. F. Lund, as an employe of defendant, the sum of $10.50, which was subject to a notice of assignment of said wages of said Lund theretofore served on the defendant by one B. H. Bronte, dated June 4, 1913, which said sum was subsequently paid by defendant to said Bronte pursuant to said notice; that the defendant has no property, estate or moneys in its hands belonging to said Lund except as stated.

An order was thereupon entered making Bronte a party

to the suit as adverse claimant, and requiring notice to be served upon him. Notice was served and he appeared and filed a statement of claim, claiming the wages, salary or compensation due and to become due said Lund from said garnishee by virtue of an assignment thereof to secure certain indebtedness of said Lund to said Bronte, evidenced by certain notes, and also of future indebtedness up to January 31, 1913.

Upon a hearing, the court found in favor of the adverse claimant and sustained his claim in the sum of $61 to any funds in the hands of the garnishee due and owing said Lund.

No issue was taken upon the answer of the garnishee. Subsequently, however, on November 18, 1912, a further hearing was had upon it and evidence offered by the plaintiff and received over the objection of defendant. Upon the hearing, plaintiff's attorney stated that he did not have the court records of the judgment then before the court to formally introduce in evidence, but would procure the same if needed. Thereupon C. F. Lund, the judgment debtor, in open court, admitted the judgment, and formal proof was waived by him. No proof, or offer of proof, of the issue and return of an execution on the judgment was made.

The plaintiff called as a witness one Tweed, treasurer and general manager of defendant garnishee. Defendant objected to the testimony on the ground that no issue having been taken on the answer, it must be taken as true, but the objection was overruled. Tweed testified that at the time of the service of the writ on defendant garnishee, Lund, the judgment debtor, was in the employ of defendant garnishee as a city salesman; that his compensation was $21 per week, payable weekly, and that at the time of the service of the writ there was due as compensation already earned the equivalent of three days' pay, or $10.50; that his wages were subject to a notice of assignment theretofore served

upon defendant by one L. H. Bronte, and that said sum was subsequently paid said Bronte, pursuant to said notice.

The court overruled objections of the defendant to any testimony by witness as to employment of Lund or the earnings of said Lund subsequent to the service of the writ and subsequent to the filing of the answer, and thereupon Tweed further testified that Lund continued in the employ of the defendant, in the same capacity and at the same rate of compensation until about October 1st, when a new arrangement was made between defendant and Lund, whereby his compensation was paid weekly in advance. Thereupon the court computed and ascertained the amount of the earnings of Lund during the period from the service of the writ to October 1st, and found in the hands of the garnishee $189.53, of which sum the court found $81 subject to the claim of Bronte, and $108.53 subject to the garnishment writ in the case in favor of the plaintiff.

The defendant objected to the finding, and the court overruled the objection and entered judgment; to which the defendant also objected and excepted.

The errors relied on for reversal are that the court erred in the admission of evidence; that the finding and judgment were based upon insufficient and incompetent evidence and are contrary to law and the evidence, and that the judgment is erroneous.

A motion is interposed by the plaintiff to strike from the transcript of record the alleged statement of facts on the ground that it is not certified to by the judge in manner and form as required by the statute. In support of the motion, the case of Seehausen, Wehrs & Co. v. Interstate S. & I. Co., 150 Ill. App. 179, is cited, and it is urged that the statement of facts is not sufficient under clause 6, Sec. 23 of the Municipal Court Act, and under the holding of this court in the case above cited. We are

of the opinion that the holding in the Seehausen case does not apply to the statement of facts in this case, and that the statement of facts complies substantially with the provisions of the Municipal Court Act. The judge, before whom the case was tried, "certifies the foregoing to be a true and correct statement of the facts appearing upon the hearing in said cause, and the questions of law presented to the court during said hearing upon said facts." An examination of the statement of facts discloses that the statement contains the facts of the case and the objections to the facts proved, and the rulings of the court upon the objections. It does not appear that any propositions of law were submitted by either party. The questions of law involved arise upon the objections to the evidence and the rulings of the court. These objections and rulings clearly state the questions of law involved. The motion to strike is denied.

The garnishment proceedings were based upon a judgment. No proof of the judgment or of the issue and return of execution was made. Lund, the judgment debtor, could not waive the proof of the judgment for the defendant. Proof of the judgment and the issue and return of execution is a condition precedent to garnishment proceedings, and in the absence of such proof, a judgment in garnishment cannot be sustained. Davis v. Siegel, Cooper & Co., 80 Ill. App. 278; Bank of Commerce v. Franklin, 90 id. 91; Bank of Montreal v. Taylor, 86 id. 388.

The court further erred in admitting incompetent evidence as to the earnings of the judgment debtor as an employe of the garnishee after answer filed, and based its finding and judgment on such evidence. We do not understand that there is any statutory provision which expressly authorizes a judgment creditor to reach the unearned wages or salary of a debtor by garnish-

sent process against his employer, if the wages of the employe were earned after answer filed. Thomas v. Gibbons et al., 61 Ia. 55; Thomas v. McDonald, 102 id. 564; Foster et al. v. Singer, 83 Wis. 392; Bliss v. Smith, 78 Ill. 359.

The judgment is attempted to be sustained upon the provisions of Sec. 5 of the Garnishment Act, and Howard Company v. Miller, 123 Ill. App. 483, is relied upon. In Howard Company v. Miller, supra, the construction of Sec. 5 of the Garnishment Act in Hanover Fire Insurance Co. v. Connor, 23 Ill. App. 207, is quoted as follows:

> "It is manifest that under this statute, the creditor is not confined to debts due, or even to debts owing at the date of the service of the writ. The statute seems to embrace all of the following cases: (1) where the debt is owing and due at the date of service; (2) where it is owing at the date of service and becomes due thereafter; and (3) where it is owing and due at any time after the service of the writ, up to the date of the answer."

Under the authorities cited, we are of the opinion that the statute does not authorize garnishment process against unearned salary, and cannot be construed to reach the salary to be earned after answer made. Sec. 14 of the Garnishment Act, as amended in 1901, provides, "No employer so served with garnishment shall, in any case, be liable to answer for any amount not earned by the wage earner, at the time of the service of the writ of garnishment."

If Lund was a "wage earner" under Sec. 14, the employer was not required to answer for wages earned after the service of the writ. If he was not a wage earner under that section his salary earned after answer could not be reached under the authorities cited. The question whether he was a wage earner or not it is not necessary to consider.

The legislative policy expressed in section 14, with reference to unearned salary or wages, is humane and just, and relieves an employe from the hardship of subjecting his unearned

wages at the time of the service of the writ and the answer to garnishment at the suit of a creditor. The court will not extend by judicial construction the express provision of the statute so as to include what is not expressly contained in the statute. The trial court went beyond the law in entering judgment for wages unearned at the time of the answer of the garnishee. The judgment of the trial court is reversed, but the cause is not remanded.

REVERSED.

103 - 19099

185 I.A. 351

THE CITY OF CHICAGO,
Defendant in Error,

vs.

EDITH MURRAY,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

The complaint in the cause in the Municipal Court of Chicago charged plaintiff in error with a violation of Section 2014 of the Municipal Code of Chicago, in that on the day named she kept and maintained a house of ill fame or assignation. On the trial, although the point was distinctly made before the cause was submitted, that the venue was not proven, the prosecuting attorney stated that it was not necessary to prove it. While it is true that the action was a civil action in debt to recover a penalty for violation of a city ordinance, it was necessary for the city to prove that the offense was committed within the corporate limits in order to show that the court had jurisdiction to try the case. The record contains no direct evidence or proof upon that point, or evidence from which the court could infer that the offence was committed within the corporate limits of the city of Chicago.

The Municipal Court Act limits the jurisdiction of the Municipal Court of the city of Chicago to offenses committed within the corporate limits of the city, and the evidence must show that the offense of violating an ordinance of the city was committed within the corporate limits in order to confer jurisdiction. Miller v. People, 230 Ill. 65; People v. Olson, 245 id. 288.

We regret that we are compelled to reverse the judgment for the want of this proof. The failure to offer the proof is inexcusable from any point of view. The witness was in court and the proof could have been made by simply asking a proper question. The judgment is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

145 - 19142

185 I.A. 352

MARY KASZMIERCZAK,
Defendant in Error,

vs.

TONY JAMROSZ,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

On October 7, 1913, defendant in error commenced a suit against the plaintiff in error in the Municipal Court of Chicago in attachment.

The trial court found the issues in attachment and on the merits against the defendant and entered judgment in attachment and a conditional judgment against garnishee. This writ of error brings before us the judgment in attachment for review upon the record.

The record contains no proof to sustain the attachment issues or either of them. The judgment, therefore, has no support in the evidence. The judgment is reversed.

REVERSED.

171 - 19174

185 I.A. 359

THOMAS SMITH, Defendant in Error, vs. MARTIN FLICKL, Plaintiff in Error.	Error to Municipal Court of Chicago.

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

Suit was commenced by Thomas Smith, defendant in error, to recover for the value of lumber wrongfully converted by the defendant, plaintiff in error, here. A judgment was rendered by the Municipal Court of Chicago for $80.

The lumber was put on the premises of the defendant by the plaintiff with defendant's permission. About two months thereafter, when plaintiff went to take away the lumber, it had disappeared, except about 700 feet which plaintiff himself had taken away some time before. The record contains no evidence tending to show that the defendant took or used any of the lumber. Defendant being a gratuitous bailee was liable only for gross negligence. Gray v. Merriam, 148 Ill. 179, Mayer v. Gerebacher, 207 id. 396. The evidence does not show gross negligence by the defendant, or any conversion of the lumber by him. The evidence does not sustain the cause of action set forth in the statement of claim. The judgment is, therefore, reversed.

REVERSED.

735

S - 16718

185 I.A. 360

CROSS and SANTA CRUZ PRINTING COMPANY,
Defendant in Error,

vs.

EDWARD H. MARHOEFER, joined with R. A. Thompson and Wellington T. Stewart, as co-partners doing business as Col. W. A. Thompson Company, (not Inc.)
Plaintiffs in Error.

Error to Municipal Court of Chicago.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This suit was based on the claim that the defendants, plaintiffs in error, and one Thompson and one Stewart were liable either as partners or under Sec. 15, Chapt. 32, of our statutes, to plaintiff (defendant in error) for printing advertising matter. The printing was done and furnished on various dates from August 14, 1911, to September 26, 1911, pursuant to an arrangement that had been made therefor by said Thompson on August 11, 1911. Judgment was rendered jointly against the defendants; plaintiff in error alone sued out the writ of error.

Said Thompson held a lease of a building which he called "The Angelus Theatre" and in which he had arranged to give comic opera performances by a company he had organized, called the "Thompson Opera Company," which was never incorporated and of which he was the sole proprietor. The bills in question were contracted for by him personally to advertise his company's performances and were charged on plaintiff's books to his theatre-"The Angelus Theatre."

Later, on August 24th, a statement for incorporation of the "Col. W. A. Thompson Co., Inc." was presented to the Sec-

retary of State and a license to open books for subscription to its capital stock was issued September 5, 1911. No steps, however, were taken to complete the incorporation.

On September 8, 1911, defendant signed an agreement which, though indefinite and obscure, contemplated the formation of a corporation with a capital stock of $10,000, and recited that Marhoefer and Stewart were each to receive $1500 worth of the stock; that the three defendants were to be directors,- Thompson, the president and manager, and Stewart, the treasurer; that Marhoefer had paid $1500 and that the payment had cleared all indebtedness of the Thompson Opera Company; that Thompson was the owner of the opera company and of said lease, and that Marhoefer was to have a lien for such payment on the property of said "Thompson Opera Company" and said leasehold.

Later, on September 12, 1911, the parties signed another brief memorandum reciting a further advancement of $1750 by Marhoefer and Stewart for which their stock interest was to be increased to $2000, and that Thompson was to be paid a salary of $100 per week after all their advances had been paid.

It is plain that the agreement was not one to purchase or subscribe for stock; on the contrary, the agreements, construed together, as they should be, treated the money advanced by Marhoefer as a loan secured by said lien, to clear up the debts of Thompson's Company, in part consideration for which Marhoefer was to receive a stock bonus in the company to be incorporated, and become one of its directors. The agreement between the parties, however, was never carried out. The company was never incorporated. Thompson continued to manage and conduct his opera company as before until it disbanded or failed.

The evidence presents no grounds of liability on the part of Marhoefer and does not bring the case within the statute

or any theory of partnership. The bill was contracted for by Thompson and charged to him,- at any rate to his theatre, which he alone was then conducting. It was contracted before Marhoefer entered into the agreements in question. He never acted or held himself out as an agent or officer of the proposed company, nor made nor authorized, as agent or otherwise, any use of its name to obtain credit or anything else. Its name was put on some of the posters advertising the performances, but at Thompson's instance and not his. The simple facts are that whatever was done was done by Thompson with respect to his own property, and it does not appear that even he attempted to obtain credit in the name of a "pretended corporation." Simply because Marhoefer attended some of the company's performances and suggested to Thompson that he get rid of one of the singers, and introduced Thompson to a bank, where he opened an account in the name of the proposed company, did not render Marhoefer liable for the bill in question in the absence of any attempt on his part to act as an agent or officer of the unincorporated company or to contract or obtain credit in its name.

The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

465 - 18936

185 I.A. 375

CHARLES P. BRADLEY, Appellee, vs. WESTERN CASKET AND UNDERTAKING COMPANY, Appellant.	Appeal from Municipal Court of Chicago.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This suit was based in part upon an oral agreement between the parties made October 11, 1911. At that time plaintiff was employed as one of defendant's managers at a salary of $200 per month. Up to that time he had been furnishing defendant with livery service for which he was to be paid $1650 per month, pursuant to a written contract dated July 31, 1911. Defendant was losing money in its business, and, desiring to be released from its obligations under said written contract, made a proposal to that effect to plaintiff, resulting in a discontinuance of the contract and a sale of his livery equipment at public auction at defendant's expense.

The statement of claim set up that about October 11, 1911, the parties verbally agreed that the written contract was to be 'canceled,' plaintiff's equipment to be 'appraised' at $6650 and sold at public auction at defendant's expense, and that if the proceeds from the sale were less than said appraised value, defendant was to make up to plaintiff the difference, and that the sum realized therefrom was $4832.

In answer thereto, defendant's affidavit of merits alleged that the consideration for the 'cancellation' of the contract was to retain plaintiff in its employ at his former salary, and that it agreed to and did pay the costs of the auction sale, but had no agreement with plaintiff regarding any loss he might

sustain therefrom.

The trial resulted in sustaining plaintiff's version of the oral agreement, and his other items of claim.

We have examined carefully the assignments of error as argued in appellant's brief. They are arranged under fifteen different points. Most of them are purely technical and in effect question the sufficiency of the statement of claim. The question of its sufficiency was not raised before trial. On the contrary, issue was taken upon the statement and the defense was conducted with a clear understanding of the real issues involved. The statement fulfilled the requirements of the Municipal Court Act in that it informed the defendant of the nature of the claim it had to meet, and the record indicates that defendant understood it. We shall not, therefore, consider whether there were omissions from the statement of claim of avermente essential to the statement of a legal cause of action, although appellant's brief is largely devoted to the discussion of these and kindred questions that in the state of the record are merely academic.

Another point made is that the statement of claim alleges that the agreement calls for the 'cancellation' of the contract of July 31, 1911, and that plaintiff's property was to be 'appraised' and that there was no proof of either. The record clearly discloses that these terms, 'cancellation' and 'appraised,' were used and manifestly understood in the sense of 'termination' and 'estimated' respectively, and the case was tried on such theory, defendant admitting the termination of the written contract and taking issue on the fact as to an agreed valuation of the property.

Another point is that "it is not alleged nor proved that the sum of $6650 was the reasonable cash value of the horses, harnesses and carriages." The allegation was that plaintiff's property was to be appraised at that sum "as a reasonable cash

value thereof and costs to plaintiff," evidently meaning that plaintiff's property was to be taken as reasonably worth that sum. Defendant, in denying that it was worth that sum, took issue upon an immaterial allegation, and all evidence relating to that matter or errors predicated thereon may be disregarded as wholly irrelevant.

It is clearly evident from an examination of the record that aside from the advances plaintiff claimed he should be credited with and the amount of the set-off defendant was entitled to, the only real question at issue was whether defendant agreed to sustain a loss, to be determined by deducting the proceeds of the sale from the estimated value of the property. It is clear that there was a verbal agreement between them, pursuant to which at least three things were effected,- a termination of the written contract, an auction sale of plaintiff's livery equipment, and payment of the expenses of the sale by defendant; and we think the evidence was sufficient to warrant a finding by the jury that the conditions on which plaintiff agreed to terminate the written contract, and sell his property, were that defendant was to make good and pay the difference between the proceeds of the sale and $6850, as its estimated and agreed value.

Another point made is that there is no consideration for the alleged agreement. Plaintiff's contract was estimated to be worth $500 a month to him. He was asked to consent to have this profitable contract discontinued because defendant was losing money under it. He assented to the proposal, but on the conditions aforesaid. Plainly, the consideration on one side was the release from obligations under a losing contract, and on the other, a fixed sum of money for the surrender of a remunerative contract.

It is claimed that plaintiff was not the sole owner of the property, but that one Marks had an interest therein.

It is clear from the record that the latter's interest was in the nature of a lien or security which was satisfied from the sale with a distinct understanding to that end between him and both plaintiff and defendant.

The only other items in dispute were whether plaintiff had advanced and paid out $85.50 for defendant, and whether the latter was entitled to a set-off for $104.50, as admitted in plaintiff's statement of claim, or $306.50, as claimed by defendant.

In support of its contentions, defendant's counsel made a general offer of a bundle of loose sheets from certain of its books and of the ledger and other books. After much discussion, defendant offered each in turn, and to determine the relevancy of such as were claimed to be original entries, the court required counsel to point out the specific items deemed to be relevant, holding that the entire books and loose sheets offered in evidence would not otherwise be received. This counsel would not or did not do, and from the record it is impossible to tell whether the items offered pertained to the said disputed items or were otherwise material. We cannot say that the court erred. It gave counsel every opportunity to designate the items and point out their materiality. The court is not required to receive proof offered in such form that its materiality cannot be determined, even though it constitutes original entries, otherwise the jury would become confused as to the issues and the record unnecessarily congested. Besides it appears that before the offer, defendant's bookkeepers were permitted to read into evidence such items in the books as counsel for defendant evidently deemed relevant. Whether the books contained anything more thereon than was already in evidence does not appear.

It is claimed that the court erred in admitting

in evidence two pads of paper containing the memoranda of the auction sales made by the clerk of the auctioneer at the time and testified to by him as his original entries and as correct. The only purpose of the proof was to show the amount of the sale, which, in fact, was not disputed, either in the affidavit of merits or by attempted proof to the contrary. On the theory that said clerk was acting for, and the agent of, defendant as well as plaintiff, it was admissible and the record supports that theory. But otherwise it was not reversible error, for the fact as to the amount of the sale was proven by plaintiff, who was present and checked up his own memoranda with that of the clerk, and not disputed.

Objection was made to introduction in evidence of the written contract of July 31, 1911, because not signed by defendant. It is enough to say that the latter succeeded to all rights of the company that did sign it, and assumed its obligations thereunder, and the contract was relevant to the question of consideration of the oral agreement.

The court refused to submit certain special findings of fact requested by defendant. The court properly rejected each one as none called for the finding of an ultimate or controlling fact.

Other points are raised, but we deem it unnecessary to discuss them, for we find no reversible error in the record.

AFFIRMED.

468 - 18950

LEROY R. PARKER,
Appellee,

vs.

CRANE COMPANY, et al., on appeal of Crane Company, Appellant.

185 I.A. 377

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $10,000 awarded to plaintiff for personal injuries resulting from negligent driving of an automobile truck owned by defendant. It ran into a street car on the rear platform of which plaintiff was standing, the jolt causing his body to lose its balance and strike the controller or some other part of the car.

He almost immediately complained of pain and consulted a physician, and in the interval before the trial manifested symptoms of neurasthenia or hysteria, or both.

It was the opinion of plaintiff's medical experts that he was suffering from a combination of both, and that such conditions would be produced by such an accident, and of defendant's experts that he was suffering from hysteria, "a disease born with the individual and not produced by traumatism," and that its manifestations are produced through suggestion and motive, furnished in the case at bar by the lawsuit.

We hardly think the record calls for a discussion of the facts in controversy or of these respective medical theories, to determine the merits of which we are in no better position than were the jury. We cannot say their verdict was manifestly against the weight of the evidence, either as to the fact or cause of injury complained of. We shall, therefore, confine ourselves to the

questions of law raised.

Complaint is made of remarks by the court. On cross-examination of one of plaintiff's experts, the court sustained objection to a question that assumed as a fact something that was not in evidence. Counsel for defense practically conceded the correctness of the ruling by saying, "I offer to connect this up," but added, "I also have the right to go into those questions to test his knowledge as an expert." The court remarked "There is no test about that,- asking him those questions." Counsel excepted. Later, another question on cross-examination alluded to an experience of illness by plaintiff as a "fit" without warrant in the evidence for such characterization. In response to counsel's insistence on the propriety of the question, when objection was made, the court remarked, "You cannot call it a fit that I can see." In each case the remarks merely expressed the views upon what the court based its ruling, and the only real question was as to the correctness of its rulings and not its reasons therefor. When, in effect, a court is invited to pass on the soundness of a theory advanced for its ruling, or to state reasons for the ruling, and its remarks are responsive, an additional objection or exception to the remarks savors more of a purpose to show counsel's displeasure with the ruling than to raise an important question of law. It is an undignified practice that should not be encouraged. There is a great difference between remarks of that character and expressions of opinions on the facts, or such as tend to influence the verdict of the jury.

All other matters argued relate to rulings on evidence. Many seem too trivial to be urged upon our attention. We shall, however, briefly review or refer to them.

Prior to the accident plaintiff had an attack of some kind - referred to by him as stomach trouble,- causing him to

go home from his office for the remainder of the day. A witness to his condition on his arrival home was asked by plaintiff's counsel if he had a 'fit,' and replied, "No." The court denied defendant's motion to strike out the answer. Another witness employed where the incident occurred and who had heard of it, testified in behalf of defendant that he observed no change in plaintiff's appearance during a certain period including the time of said incident. On cross-examination he was asked if he considered the incident of 'any importance.' He answered over objection that he did not know what the question meant, but that it was important to him to know whether plaintiff, his subordinate, was in condition to work. He otherwise expressed no opinion.

Another witness for defendant, who had heard of an 'hysterical' attack suffered by plaintiff after the incident in April, 1910, was asked on cross-examination if he knew it was 'serious,' and over objection answered, "Yes," but added that it had no effect upon him so far as witness could see.

These matters were so obviously harmless, if error, that we shall refrain from discussing them.

Before any witness had attempted to characterize the incident referred to as an hysterical attack, counsel for defendant asked a question, referring to it as a 'fit.' An objection thereto was sustained, and properly, for we find nothing in the record to warrant such characterization, and the court's remark practically to that effect was justified. It is not proper practice for an attorney under the guise of a question to assume as a fact in a case that which has no testimony to support it. Evidence cannot be supplied in that way.

The motorman of the street car, called in behalf of plaintiff, said he "felt the jar" of the collision. On cross-examination he characterized it as a "slight jar." Later, when

recalled for cross-examination, evidently for impeachment, he was asked if he did not in a written statement call it "a very slight bump." The court sustained an objection to the question and refused to receive the statement in evidence. The statement presented no material contradiction of his previous testimony. At best the variance was insignificant.

Certain lay witnesses testified to the general appearance of plaintiff after the accident. Defendant objected on the ground that they should be required to state his appearance as they observed it on each specific occasion. The answers contained nothing the witnesses might not properly testify to, and did not preclude defendant from making a more specific inquiry.

Attention is called to several adverse rulings on the cross-examination of plaintiff. Some of the objections may have been well taken, but on careful examination we find no ruling that would justify a reversal. The questions related mainly to plaintiff's experiences from the time of the accident, which became the subject of an unusually searching and prolonged cross-examination, and we think full opportunity to inquire into all material matters was given.

Complaint is made of rulings sustaining objections to questions put on cross-examination to one of plaintiff's experts. One question called on the witness to speculate about what other doctors were "likely to say" of certain diagnoses, and another to tell how much physical exercise of certain kinds would be required to modify his previously expressed opinion based on a hypothetical question. To the latter he answered, "I don't know," and the court sustained an objection to that line of inquiry, but no other question was put. We find little, if any, ground for complaint of the court's rulings, or its suggestion that they "get down to the evidence in the case."

One of plaintiff's attending physicians was called to testify to the objective symptoms he found on his examination of plaintiff. The court refused to let defendant's counsel, on cross-examination, obtain opinions as to their consequences, they not having been inquired of on direct examination. If defendant desired such opinions, the door was open to call the physician as its own witness. It was not proper cross-examination.

Plaintiff was asked by defendant's counsel, "Will you submit to a physical examination of doctors that I select?" He answered, "Yes, under the direction of my attorneys * * * any time the court sees fit. * * * If you can arrange it with the attorneys. I am perfectly willing myself." His attorney evinced no disposition to consider the matter, and thereupon counsel asked, "Regardless of what your attorneys say, will you or will you not submit to a physical examination?" An objection to the question was sustained, and then followed a fruitless effort to get plaintiff's counsel to take up the matter. Defendant did not suffer from the ruling if incorrect, as it had the benefit of an answer which left the matter for the decision of his attorney, who plainly indicated his unwillingness. Getting that fact before the jury was about all the benefit defendant could get from the question if it could not get an examination, to which, of course, the plaintiff was not required to submit. (City of Chicago v. McNally, 237 Ill. 14.)

It is urged that the hypothetical question put to plaintiff's experts omitted important facts, and allowed the witnesses to invade the province of the jury. Of course, a party is not obliged in his hypothetical question to assume all the facts in evidence that may bear on the answer sought, and the course is always open to the other party to supply, on cross-examination, any omission deemed material,- and the record shows

that defendant's counsel fully availed himself of that privilege. (Chicago City Ry. Co. v. Rumy, 210 Ill. 39.) The questions called for answers upon a hypothetical state of facts, and hence not for ultimate facts and did not invade the province of the jury. (Fahey v. Chicago City Ry. Co. 229 Ill. 548.)

Whether or not the accident was the proximate cause of the injury was a question of fact properly left to the jury, and included consideration of whether there was any intervening cause as urged. The trial consumed nearly two weeks' time and it would be strange if some errors did not creep into the record. If defendant was liable for all plaintiff complained of, then it escaped with a light verdict, indicating neither passion nor prejudice on the part of the jury. We find no reversible error.

AFFIRMED.

35 - 19017

DAVID WIENER, doing business as WIENER LUMBER COMPANY, Defendant in Error,	)	185 I.A. 379
vs.	)	Error to Municipal Court of Chicago.
AMERICAN COAL AND SUPPLY COMPANY, a corporation, Plaintiff in Error.	)	

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff sued for the contract price of wood he sold defendant. The defense was that the quality was not as represented and that defendant was entitled to a deduction of the difference between the contract price and the market price of the wood delivered.

The case was tried without a jury and the testimony as to the quality and character of the wood and the terms of the order for it was very conflicting, and the trial court was in a better position to determine the truth than we are. We do not think the record is such as to justify a reversal of the judgment, either on the ground that it is not justified by the evidence or that incompetent testimony was admitted, and this is all the record brings before us for consideration.

AFFIRMED.

55 - 19041

185 I.A. 380

HENRY J. SPRUHAN, Plaintiff in Error,	)	Error to Municipal Court of Chicago.
vs.	)	
THE SEARCHLIGHT GAS COMPANY, Defendant in Error.	)	

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff's claim was for salary for service rendered defendant from January 31st to February 15, 1912, at the rate of $250 per month, alleged in the statement of claim to be pursuant to an agreement recorded in the minutes of defendant's board of directors.

The affidavit of defense claimed that he rendered no services after January 31st, and, besides, was on February 21st paid $125 by defendant's then acting president, Bauer, in satisfaction of said claim against defendant.

The trial did not follow closely the issues raised by the pleadings, and the rules of the Municipal Court invoked for their construction are not before us and, therefore, cannot be considered.

Looking to the issues, however, as construed by the parties themselves in their conduct of the trial, we find that plaintiff based his claim upon the contention that he was to receive such salary as treasurer of the company, to which office he was elected in July, 1911. He claimed that Bauer, his brother-in-law, one of the directors, told him that such a salary had been voted to him as treasurer. No such salary was provided for by the corporation's by-laws and no resolution to that effect was passed by defendant's board of directors, and the minutes thereof, showing the election of plaintiff as its treasurer,

disclose no provision for a salary. No express contract of any kind for such a salary was proven by plaintiff. It did appear, however, that he had performed services in the nature of an auditor and accountant before his election as treasurer and continued to perform the same duties thereafter until January 31, 1913, for which he was paid $250 per month, and that he rendered no services after January 31st, claiming that Bauer suggested to him that he discontinue going to the office. Inasmuch as plaintiff failed to prove any express or implied contract obligating the company to pay him for services after he discontinued rendering the same, the court properly held he could not recover. This view of the case dispenses with any necessity for considering whether the personal check subsequently given to him by Bauer was for defendant's account or Bauer's personal account, as claimed by plaintiff.

AFFIRMED.

87 - 18079

FIRST NATIONAL BANK OF PRINCETON,
Defendant in Error,

vs.

JOSEPH C. FICKLIN,
Plaintiff in Error.

185 I.A. 381

Error to
Municipal Court
of Chicago.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Judgment was rendered against plaintiff in error on his promissory note. When the case was duly called for trial his attorney of record was absent, and one Pacyna appeared and presented an affidavit in support of a motion for a continuance on the ground that said attorney was engaged. The affidavit was wholly inadequate to warrant a continuance, and there was no abuse of discretion by the court or violation of law in denying it.

The note, the execution of which was not denied, when offered in evidence made a prima facie case for plaintiff, including the fact of plaintiff's ownership, notwithstanding a stamped endorsement thereon to the First National Bank of Chicago, which, under the statute, the owner was privileged to strike out.

Nor was proof of a consideration essential to a prima facie case. The want of it was an affirmative defense for defendant to establish.

The contentions for reversal are so obviously untenable and devoid of merit that we can reach no other opinion than that this writ of error was sued out and prosecuted for delay. Hence, under Section 23, Chapter 33, R. S., ten per centum of the amount of the judgment will be added thereto.

AFFIRMED.

106 - 19102

CHARLES ANDREWS, Defendant in Error,	)	185 I.A. 282
vs.	)	Error to Municipal Court of Chicago.
JAMES SARANTAKIS ~~et al., JAMES SARANTAKIS~~, Plaintiff in Error.	)	

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The only question here involved is whether a second mortgagee acquired a lien and right to possession of the mortgaged goods and chattels superior to those given by a prior mortgage thereon simply because an affidavit of the extension of the latter, duly recorded in the Recorder's office and filed with the clerk of the Municipal Court, was not entered on a docket or record of said court.

The fact that the prior mortgagee, who did all the law required of him to render such extension valid and to assert his rights thereunder, cannot be prejudiced by the failure of the clerk to perform his duty by making the entry, ought itself to be decisive of the case. (Pease v. Fish Furniture Co., 176 Ill. 220.)

But it also appears that when the second mortgage was given, not only was the possession of the mortgagor consistent with the terms and conditions of the first mortgage, of which the second mortgagee had full notice from the day of its execution, and that he was not misled or induced to take any steps by reason of such continuing possession, thus taking subordinate to a prior encumbrance (Van Pelt v. Knight, 19 Ill. 488; Cunningham v. Nelson Mfg. Co., 17 Ill. App. 510), but that the second mortgage contained an express provision that it was subject to said

prior mortgage. It is the generally accepted doctrine that where a second mortgage contains such a stipulation it conveys nothing more than the equity of redemption. (Jones on Mortgages, Vol. 1, (5th Ed.) pp. 466-7, Cobbey on Mortgages, Vol. 2, Sec. 1039; Howard v. Chase, 104 Mass. 249, Packer v. Silsby, 123 id. 108, Eaton v. Tuson, 145 id. 218; Flory v. Comstock, 81 Mich. 502; Young v. Evans, 158 Mo. 395.) At any rate in the absence of fraud or injury it should estop a party to it from questioning the validity of the first mortgage. The doctrine is consistent with the law and decisions in this state.

Authorities are cited by defendant where after both mortgages had fallen due, and there was an unreasonable delay to enforce them, priority of lien was given to the mortgagee who first took possession. Here not only was the second mortgage not due but the first mortgagee undertook to enforce his claim on the first day after the expiration of the extension. Even if the extension was not valid the circumstances disclosed by the record would not indicate that there was an unreasonable delay on part of the latter. The court properly held that the first mortgagee was entitled to possession of the property under the writ of replevin sued out.

AFFIRMED.

176 - 19179

FRANK SANVAITIS,
Defendant in Error,

vs.

SWIFT & COMPANY, a corporation,
Plaintiff in Error.

185 I.A. 385

Error to
Municipal Court
of Chicago.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff below suffered a personal injury while in the employ of defendant, and the action was based upon defendant's alleged failure to furnish plaintiff a reasonably safe place to work. Plaintiff was employed in loading cars with ice which he wheeled in a truck to the edge of a platform and there dumped the ice into a chute. To prevent the chute from slipping there was a piece of timber underneath its upper edge that caught on a ridge of timber on the edge of the platform. As plaintiff was dumping a load of ice, the chute gave way and he and the truck were thrown to the ground, causing the injury complained of. As to the cause of the accident plaintiff's helper testified that a piece of the timber on the lower edge of the chute was broken off; that it was rotten all around, and that it was afterwards repaired and a new piece put on. While all this was denied, it is unnecessary to examine into this phase of the case, for it was incumbent on plaintiff to prove not only the defect but that he did not know of it and did not have equal opportunities with his master of knowing it. (C. & E. I. R. R. Co. v. Heersy, 203 Ill. 492; Sargent Co. v. Baublis, 215 id. 428; McCormick Machine Co. v. Zakzewski, 220 id. 522; Diamond Glue Co. v. Wistzychowski, 227 id. 338; Montgomery Coal Co. v. Barringer, 218 id. 327, 329.) There was no proof of this character, and the nature and simplicity

of the appliance, or chute, and plaintiff's handling of it daily in moving it from place to place along the platform, would indicate that he had such opportunity. The failure to make such proof made it error for the court to deny defendant's motion for an instructed verdict. The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

193 - 19:67

UNITED BREWERIES COMPANY, a corporation,
Plaintiff in Error,

vs.

G. BERNARD ANDERSON, as Administrator of the Estate of ALFRED KINELL, and EDWARD SWARTZ,
Defendants in Error.

185 I.A. 386

Error to
Municipal Court
of Chicago.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The plaintiff corporation brought suit for conversion of certain saloon fixtures, which the undisputed evidence in the record shows it owned. The verdict was for defendants and the judgment against plaintiff for costs.

The testimony in plaintiff's behalf was in substance that it bought and owned said fixtures and that it allowed one Alfred Kinell, since deceased, to use them so long as he purchased its beer; that such arrangement was in force when he died; that Anderson after the administration of the estate took possession of the property and inventoried it among the assets, and refused to deliver up the same to plaintiff on its demand, and subsequently sold it to the defendant Swartz.

Two fire insurance policies on said property, taken out by Kinell in his lifetime, constituted all the evidence received in defendant's behalf. It was plainly incompetent, amounting to nothing more than a self-serving declaration, and the court improperly overruled the objection to its admission, and erroneously instructed the jury that they might consider such policies in determining the question of ownership.

Under the undisputed evidence, the statute of limitations had not run and it was also error for the court, under

its instructions, to leave to the jury as a matter of fact to determine whether it had. The motion for a new trial should have been granted.

Defendant's counsel allude to an alleged rule of the Municipal Court as to the practice there with reference to objections to oral instructions. We cannot take judicial notice of it and it does not appear in the record.

REVERSED AND REMANDED.

193 - 19187

UNITED BREWERIES COMPANY, a corporation, Plaintiff in Error,	)	
vs.	)	Error to Municipal Court of Chicago.
G. BERNARD ANDERSON, as Administrator of the Estate of ALFRED KINELL, and EDWARD SWARTZ, Defendants in Error.	)	

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

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Under the undisputed evidence, the statute of limitations had not run and it was also error for the court, under

its instructions, to leave to the jury as a matter of fact to determine whether it had. The motion for a new trial should have been granted.

Defendant's counsel alludes to an alleged rule of the Municipal Court as to the practice there with reference to objections to oral instructions. We cannot take judicial notice of it and it does not appear in the record.

REVERSED AND REMANDED.

314-19319

GEORGE W. RANDALL and T. F. RANDALL, trading as G. W. RANDALL & CO.,
Defendants in Error,

vs.

R. WHITTINGHAM,
Plaintiff in Error.

185 I.A. 388

Error to Municipal Court of Chicago.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiffs below brought suit for goods sold and delivered on open account, consisting of 5767 pounds of chickens at 6¢ per pound, amounting to $288.40, on which a credit of $50 was allowed. Defendant, in his affidavit of defense, admitted the purchase of the chickens at 5¢ per pound and alleged that "about one-third" were delivered to him in an unwholesome and unsalable condition. The court, deeming such allegation as an admission of a portion of the claim, entered judgment for $96.66, reserving the rest of the claim for future consideration.

The assignments of error are predicated on a common law record showing no motion to vacate the judgment or exception thereto, in fact nothing but the pleadings, orders relating thereto which were acquiesced in, and said judgment. The judgment is not void and for aught we can tell from the record, it was properly entered under the practice that obtains in the Municipal Court. How the amount was reached we cannot tell and there is nothing before us to justify a consideration of it. But it appears from a recital in the judgment that it was based on proofs that do not appear in the record. The record shows no points for review on errors saved in the court below and the judgment must, therefore, stand.

AFFIRMED.

22 - 18993

LOUIS A. ELISBURG,
Defendant in Error,

vs.

NELLIE K. BERKEY and ARISTA W. BERKEY,
Plaintiffs in Error.

185 I.A. 389

Error to
Municipal Court
of Chicago.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

In this case a writ of restitution was granted after hearing before the court in a suit for forcible entry and detainer brought by the defendant in error, as plaintiff, against the plaintiffs in error, as defendants. The plaintiff, claiming right of ownership by a quit-claim deed from Nellie K. Berkey, had been in possession of an apartment building for some months, the tenants having attorned to him. One of the apartments became vacant, and prior to August 30, 1912, the defendants took possession of it, and on the date mentioned the present suit was brought. At the trial an attempt was made by the defendants to have tried the question as to the ownership of the property, the claim being made that the quit-claim deed was obtained by fraud.

We think it clear from the evidence that the plaintiff had possession of the property and that, as heretofore stated, the tenants thereof had been attorning to him. We think the court, under the evidence, was justified in the conclusion that the entry by the defendants was forcible, and therefore a demand for possession was unnecessary (Stillman v. Palis, 134 Ill. 533).

The judgment order refers to the complaint for the description of the property. The point now urged in this court,

that the order does not sufficiently describe the property, was not made in the Municipal Court in any way. It may not therefore properly be considered in a court of review. Armstrong v. Crilly, 167 Ill. 546. That in an action of forcible entry and detainer the question of the title to premises is not involved is thoroughly established. Muller v. Balke, 167 Ill. 150.

The judgment is affirmed.

AFFIRMED.

126 - 19122

185 I.A. 390

LOUIS A. ELISBURG,
Defendant in Error,

vs.

NELLIE K. BERKEY and ARISTA W. BERKEY,
Plaintiffs in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

This is a suit in forcible entry and detainer. The record in this case is like that in No. 18903, in which an opinion has been filed this day, excepting that in the present case the flat was known as "No. 2 in the building at 5029 Jefferson avenue," and in the other case the flat was known as "No. 5." The present case was submitted to a jury and a verdict and judgment were rendered in favor of the plaintiff. The grounds urged for reversal in this case are the same as those in the case last referred to, and for the reasons assigned in the opinion therein the judgment in the present case must be affirmed.

AFFIRMED.

66 - 19055

BERNARD BROZOWSKI,
Plaintiff in Error,

vs.

STANISLAW GROHOCKI,
Defendant in Error.

185 I.A. 391

ERROR TO MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

In this case judgment was rendered against the plaintiff in error for costs, the suit having been brought by him against the defendant in error for commissions alleged to be due in effecting the sale of a piece of real estate in Chicago. The plaintiff introduced in evidence a partly executed contract, purporting to be between Grohocki, the defendant, and John Svatik and Eva Svatik, in and by which Grohocki was to convey to John and Eva Svatik certain property in Chicago in exchange for certain property said to be owned by John and Eva Svatik in Indiana. In the form of contract it was provided that Grohocki should pay plaintiff $150 and the other parties to the contract pay him $200. This form of contract was signed by Grohocki and John Svatik, but was not signed by Eva Svatik.

There was evidence tending to show that John and Eva Svatik were man and wife and that they were tenants in common of the Indiana farm. It seems to be the argument of the plaintiff in error that he is entitled to recover because, as he alleges, John Svatik was at all times ready, able and willing to carry out the contract. As John and Eva Svatik were owners in common of the farm, it is perfectly evident that both of them must have joined in the contract to make it effective so far as the defendant is concerned. From the statement of facts it would appear that plaintiff's counsel stated he proposed to show that Mrs. Svatik, as well as her husband, was always

ready, able and willing to perform. No attempt, however, was made to prove this, except by the introduction of the partly executed agreement, which did not tend to prove it.

The judgment must be affirmed.

AFFIRMED.

89 - 19081
19081

CAUSETTA POSEY,
Defendant in Error,

vs.

WILLIAM B. GRAHAM,
Plaintiff in Error.

185 I.A. 392

Error to
County Court,
Cook County.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

Suit was brought by the defendant in error against the plaintiff in error to recover the amount of $500 obtained from the former by the latter in April, 1911. Her claim was based upon an agreement by which she should have the option of an interest in certain lands located in Lee County, Florida, on a return of the advancement with interest. Her averment was that she elected to take the sum advanced, and the interest, in accordance with the terms of the contract; that the defendant refused to return the money upon her demand, but instead offered her certain shares of stock in what was known as the Everglades Cane & Fruit Land Co.

There were two trials of the case in the County Cour and in each instance a verdict rendered in her favor. It would seem that a new trial was granted after the rendition of the fir verdict by consent. The trial court entered a judgment on the se ond verdict, and to reverse the judgment the writ of error from this court was sued out.

We are asked to reverse upon the ground that the verdict was against the manifest weight of the evidence. Great stress is laid upon the fact that the defendant in some of his contentions was corroborated by other witnesses. After careful

examination of the record we are of the opinion that the verdict was not manifestly against the weight of the evidence.

The closing portion of the receipt signed by the defendant reads: "Bro, if you prefer on surrender of this receipt I will return your $500 with interest thereon at 6% per annum, you to take no part in the purchase." We are not satisfied from the record that plaintiff ever accepted the certificate of stock, and therefore are of the opinion that a correct conclusion was reached in the County Court.

The judgment is affirmed.

AFFIRMED.

144 - 10141

185 I.A. 395

J. RICHARDS,
Defendant in Error,

vs.

GEORGE E. OLSEN, doing business as RELIANCE FUEL & TRANSFER CO.,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

Judgment in garnishment was rendered in this case in favor of defendant in error. Suit was brought by Richards upon a note given by one Nicholas Nelson, who at the time of beginning of the suit was an employe of George E. Olsen, the plaintiff in error. At the time of the execution of the note Nelson gave to Richards a blank assignment of his wages and delivered an alleged power of attorney. He was not at this time in the employ of Olsen, but of another, nor did he at the time have any contract of employment with Olsen.

The rule is that wages to be earned under an engagement existing at the time of giving the order are assignable; but not money to be earned thereafter under a new engagement. Hartley v. Tapley, 2 Gray 565; Stromberg, Allen & Co. v. Hill, 170 Ill. App. 383; Blakeslee v. Make-Man Tablet Co., 175 id. 515.

As Nelson himself could not execute a valid assignment of wages to be earned in some future engagement or employment, it is clear that he could not authorize or empower an attorney in fact to make such an assignment for him.

For the reasons stated the judgment is reversed.

REVERSED.

189 - 19171

ABRAHAM SILVERMAN and SAMUEL SILVERMAN,
Defendants in Error,

vs.

LENA KROMER,
Plaintiff in Error.

185 I.A. 400

Error to
Municipal Court
of Chicago.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

Judgment was obtained in this case in favor of the defendants in error and against the plaintiff in error, on a claim for commission of the defendants in error as real estate brokers. Among other grounds alleged for reversal is one to the effect that the finding of the trial court is not supported by the evidence.

Upon a review of the record we find no evidence of the fact alleged in the statement of claim that the defendants in error had produced a purchaser for the property of the plaintiff in error who was ready, willing and able to buy the property on the terms fixed by the plaintiff in error. It is said that it was unnecessary to support this allegation in the statement of claim by evidence because the allegation was not denied in the affidavit of defense, and that there is a rule in the Municipal Court, in which the case was tried, to the effect that every allegation of fact in any statement of claim, if not denied specifically or by necessary implication in the affidavit of merits, is admitted. We are not permitted to take judicial notice of the rules of the Municipal Court. Sixby v. Chicago City Ry. Co., 260 Ill. 478. The record does not disclose the existence of such a rule.

The finding of the court is not supported by the evidence in the record, and for that reason the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

38½ - 13506

CAROLINE KARL,
Defendant in Error,

vs.

R. G. RADEAUX and JAMES N. WILTON,
Plaintiffs in Error,

Impleaded with
CHRISTOPHER STRASSHEIM, etc.,

185 I.A. 402

ERROR TO SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

In this case a writ of error was taken from the Supreme Court of Illinois to the Superior Court of Cook County for the review of a decree entered in the latter court. The Supreme Court, finding itself without jurisdiction in the premises, transferred the case to this court, in pursuance of the statutory provision.

The decree finds that on July 7, 1905, the complainant Caroline Karl, was the owner in fee simple of certain described property and in the possession thereof, and had been for many years prior thereto; that on July 7, 1905, a judgment was entered before a justice of the peace against her for the sum of $167.25, one Patrick McHugh being plaintiff; that on April 16, 1907, this judgment was assigned to one Tracy Nelson; that on April 17, 1907, a transcript of the judgment was filed in the Circuit Court of Cook County and an execution issued by the clerk of the court; that on July 18, 1907, the sheriff levied on the premises mentioned in the decree and the premises were struck off to one Charles Morris; that no certificate of sale was issued by the sheriff to the purchaser, nor a duplicate thereof recorded by the sheriff within ten days of said sale, as required by law; that there was filed with the sheriff on July 2, 1908, an instru-

ment in writing signed by Tracy Nelson, authorizing one A. N. Tagert to "sign, release or receipt" for him "anything necessary to ascertain or procure the certificate of sale against Caroline Karl now in the hands of the sheriff of Cook County and which time to redeem expires on or about the 20nd day of September, 1908"; that thereafter Tagert executed a receipt as attorney in fact for Nelson to the sheriff on the execution for the amount of the execution and costs; that the sheriff thereupon executed a certificate of sale, on July 3, 1908, and filed for record a duplicate thereof in the office of the Recorder of Deeds of Cook County; that no notice of the levy of the execution was given by defendant, and no notice of the date of the sale, and that complainant did not learn of the sale until in the month of September, 1908, after the time within which to redeem therefrom had expired; that in the latter part of November, 1908, Badeaux obtained a certificate of sale and is now the holder thereof; that he did not obtain it from Morris, but from one Schroeder, the certificate being endorsed in blank on the back, with the name of the grantee therein, Charles Morris, and is now held by Badeaux, who acquired only an equitable title thereto.

The decree further finds that the premises were reasonably worth $4500; that the transcript was erroneously issued after the assignment of the judgment; that it showed on its face the issue of an alias execution but did not set forth such execution and return of the officer thereon; that the transcript was certified by the clerk of the Municipal Court but was not in conformity to the requirements of the statute, and that the transcript did not authorize the issuance of an execution; that the sale was made without notice to the defendant in the execution, and that the sheriff failed to set off to the defendant (complainant) her estate of homestead, and that the premises were sold for a grossly inadequate price.

After other findings, it is decreed that the execution issued on the transcript of judgment in favor of McHugh be vacated, and that the certificate of such sale issued thereon and now held by Badeaux, be delivered upon payment to the clerk of the court of the amount of the judgment in favor of McHugh, with interest.

The one ground stated in the argument for reversal of this decree is that the homestead of the complainant "should have been set off in this proceeding." What interest Badeaux had in the complainant's homestead, or why the decree should be setaside because it was not set off to her, is not stated.

It is obvious that no reason exists for reversing the decree, and it is affirmed.

AFFIRMED.

239 - 18363.

185 I.A. 406

MARY RAPHAEL, Defendant in Error,	ERROR TO
vs.	MUNICIPAL COURT
J. W. McGRAW, Plaintiff in Error.	OF CHICAGO.

MR. PRESIDING JUSTICE GRAVES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error entered into a contract in writing with defendant in error on May 25, 1910, to build for her a flat building for the sum of $4,500. Of this amount $2,000 was by the terms of the contract to be paid to him when the building was under roof, $1,000 when plastered and $1,500 when finished. He commenced the performance of his contract and continued work on the building until, as he claims, the same was plastered, within the meaning of the contract, when he demanded the $1,000 which was to be paid when the building was plastered. The $2,000 to be paid when the building was under roof was duly paid, but when the $1,000 to be paid when the building was plastered was not paid a controversy arose between the parties which eventually resulted in the abandonment of the job by plaintiff in error. The building was later completed by defendant in error. This suit was brought to collect from plaintiff in error $ 488.50, which defendant in error claims it cost her to complete the building according to the specifications, in excess of the contract price. Plaintiff in error filed a claim for set-off amounting to $358.92. The jury found the issues for defendant in error and assessed her damages at $394.52. To reverse a judgment entered on the verdict of the jury, this writ of error is prosecuted.

Plaintiff in error does not deny that he abandoned the contract and all work under it before the building was completed, but attempts to justify his course in that respect

on the ground that defendant in error did not pay the $1,000 when the plastering was finished and was, therefore, guilty of the first breach of the contract. On the other hand, defendant in error insists that the $1,000 was not due at the time plaintiff in error demanded it, because the plastering was not then finished. These questions, as well as the claim of plaintiff in error for extra work, the parties were entitled to have the verdict of a jury upon, based on all the competent evidence offered and on no other and under proper instructions.

The contract was in writing and was apparently full and complete. Specifications as to the work to be done were made part of it. If it was uncertain or indefinite in any regard, that fact has not been pointed out. Yet on the trial a letter written by plaintiff in error to defendant in error weeks before the contract in question was entered into and relating to entirely different plans for a building was admitted in evidence over the objection of plaintiff in error. Defendant in error was also permitted to testify to conversations with plaintiff in error had prior to the time the contract was entered into, concerning the contemplated work.

Upon the signing of the contract all previous negotiations and conversations were merged in it, and were inadmissible to alter or contradict it. Graham v. Sadlier, 165 Ill., 95; Fuch & Lang v. Kittridge, 148 Ill. App., 350; Clark v. Mallory, 185 Ill., 327; Fairpont v. Lamphire, 104 Ill. App., 232; Grubb v. Milan, 249 Ill., 456.

Plaintiff in error undertook to prove by experts the condition the plastering of a building must be in to fulfill a contract providing for the payment of $1,000 "when the building is plastered", according to the recognized custom in the building trade in Chicago. This was erroneously excluded. The rule, as we understand it, is correctly laid down in Elgin

v. Joslyn, 36 Ill. App., 301, where the court said:

"******Where writings or contracts contain general words appropriate to particular trades or branches of business having a technical significance or sense as applicable to the trade or business in which they are used, parol evidence may be received from those who are familiar with the particular trade or business as to the meaning of such words."

And it was there held that such evidence was admissible to show whether the work of laying a sewer and connecting pipes was included in the general term "mason work". See also Steidtmann v. Joseph Lay Co., 234 Ill., 84.

We think the rule there announced applies with full force to the case at bar.

Among the instructions given the jury was the following:

"If the jury believe in this case from the preponderance of the evidence that the contract in question here, dated May 25, 1910, between these parties, was completed by the defendant, then your verdict should be for the defendant; on the other hand, if you believe from a preponderance of the evidence in this case that the contract was not completed by the defendant and further believe from the evidence that the plaintiff has complied with her part of the contract, in so far as she could, then your verdict should be for the plaintiff, and you should assess the plaintiff's damages at such an amount as is shown by the evidence she suffered in this case."

This instruction was erroneous in so far as it limited the duty of defendant in error to perform her part of the contract "in so far as she could". One party to a contract can not enforce it against the other unless he performs it on his own part. It is not sufficient for him to perform it "as near as he can." He must perform it as made or stand the consequences of his failure to do so. It is immaterial on the question of his right to enforce it, whether his failure to perform it on his part is due to willfulness or misfortune. Walker v. Tucker, 70 Ill., 527; Summers v. Hibbard, Spencer, Bartlett & Co., 153 Ill., 102; Dean v. Lesey, 50 Ill. App., 354; School Directors v. Crews, 23 Ill. App., 327.

Plaintiff in error requested the court to instruct the jury, in substance, that substantial performance on his part of the contract in respect to finishing the plastering before demanding the $1,000 was all that was necessary. This the court refused to do. The instruction requested was a correct statement of the law applicable to the case and should have been given. Shepard v. Mills, 173 Ill., 343; Sauer v. Hindley, 222 Ill., 319; Hardy v. McDonald, 149 Ill. App., 111, ibid., 244 Ill., 494; Turner v. Osgood Art Color Type Co., 223 Ill., 629.

For the errors pointed out the judgment is reversed and the cause is remanded to the Municipal Court.

REVERSED AND REMANDED.

327 - 18367.

BEST TAILORING COMPANY, a corporation, Appellant,	185 I.A. 408
vs.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
HARRY R. CLANCAY, Appellee.	

MR. PRESIDING JUSTICE GRAVES DELIVERED THE OPINION OF THE COURT.

Appellee was employed by appellant to sell goods. The contract was in writing. It is stipulated in that contract that the term of service shall begin November 1, 1908, and end December 31, 1911; that appellee shall receive as salary $5,000 per year, payable in equal monthly installments, that he shall receive expense money not to exceed $2,000 per year to be paid on receipt of expense accounts, and that he shall receive as commissions 7% on the amount of goods sold during any one year in excess of $100,000; that appellee guaranteed to sell not less than $50,000 worth of merchandise during any one year beginning with January 1, 1910, and agreed that if his sales were less than $50,000 during any one year he would pay appellant 14% on the difference between the amount of his sales and $50,000.

Appellee began his service on November 1, 1908, as agreed and continued therein until on or about October 1, 1910, when he abandoned the employment. For the year beginning with January 1, 1910, his sales lacked $28,008.29 of amounting to $50,000. This suit was brought to recover from him 14% on that deficiency.

None of the foregoing facts are disputed by appellee. His affidavit of merits discloses that he based his entire defense in the Municipal Court on the claim that in the negotiations preceding the drafting and execution of the written

contract, appellant has agreed to furnish for appellee to sell, during the life of the contract lines of suits, the cheapest of which should be sold by him at $15 per suit; that appellant had failed to furnish the $15 line of suits for the entire time during which appellee worked for appellant, but had withdrawn the same from the market, without his consent and against his protest, after he had been at work under the contract for a few months, and had refused to fill the contracts already taken by appellee for the same; that the withdrawal of that line of suits from the market ruined the business established by appellee and prevented him from doing the volume of business he had contracted to do and which he otherwise would have done, whereby he was compelled to abandon all further efforts to sell goods under the contract. He also filed a claim for set off for the amount of the agreed salary from October 1, 1910, to January 1, 1913, on the theory that he had been prevented from performing his contract by the act of appellant.

The jury found the issues against appellant. An appeal from a judgment on the verdict brings the record here for review.

At the trial appellee was permitted to prove conversations which it is claimed occurred before the contract was signed and that led up to it, to show that appellant undertook to furnish the trade in appellee's territory a $15 per suit line of goods. He was also permitted to prove that appellant failed to perform its contract in this respect.

He attempts to justify that course on the theory that the written contract does not and was not intended to be a final statement of the whole agreement between the parties, particularly referring to the class of goods that was to be furnished by appellant for appellee to sell. It is stipulated in the contract that "Party of the second part (appellee) fur-

ther agrees to act under the general direction of the party of the first part (appellant) and to work in harmony and conjunction with said party of the first part, also to sell at the prices and upon the terms designated by the party of the first part". The plain meaning of that stipulation is that appellant was to be the arbiter of the prices for which and terms upon which its goods should be sold by appellee.

We have carefully examined the entire contract and have considered the evidence of the attorney who drew it, and those present when it was drawn, by which it appears that a preliminary draft of it was made and submitted to appellee who went over it and suggested many changes which were incorporated in the draft finally signed and find nothing to indicate that it was intended to leave any part of the entire contract of employment resting in parole. On the contrary, we are impressed with its evident completeness and lack of ambiguity. To our minds, it does not come within any exception to the general rule that prohibits oral evidence from being received to vary, contradict, or modify a written contract unambiguous in its terms. Town of Kane v. Farrelly, 193 Ill., 521; Fuchs & Lang Co. v. Kittredge, 243 Ill., 98.

The evidence received of prior negotiations and conversations by which appellee sought to establish an agreement on the part of appellant to furnish for him to sell a $15 grade of suits was clearly an attempt to vary the terms of the written contract by which appellee bound himself to sell at prices and terms to be designated by appellant, and was improperly admitted. Appellee's claim of set-off was not supported by any competent evidence and the court erred in not excluding it from the consideration of the jury.

If these promises were made as claimed, and appellee desired to rely on them, it was his duty to see to it that they were included in the written contract finally executed. Fail-

ing in this appellee has no alternative, except to raise by the contract as made or respond to appellant in damages for its breach. The evidence clearly shows a right in appellant to recover damages for a breach of the contract sued on. The verdict of the jury was palpably contrary to the evidence.

Numerous other errors in the rulings of the court on the admission and exclusion of evidence and on instructions having reference to appellee's claim for set-off are pointed out in appellant's brief, but as the question of the set-off will be eliminated at the next trial, it is unnecessary to discuss them in this opinion.

The judgment of the Municipal Court is, therefore, reversed and the cause is remanded to that court for further proceedings not inconsistent with the views here expressed.

REVERSED AND REMANDED.

29 - 18389.

185 I.A. 410

WILLIAM F. YOST, Jr., Defendant in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT
WILLIAM F. YOST, Plaintiff in Error.	)	OF CHICAGO.

MR. PRESIDING JUSTICE GOAREE DELIVERED THE OPINION OF THE COURT.

To review a judgment in the Municipal Court against plaintiff in error for $896 a writ of error was sued out from this court. Later the stenographic report of the evidence was on motion of defendant in error stricken from the files of this court, because the same had never been filed in the Municipal Court, and was, therefore, no part of the record in the case.

No assignment of error questions anything shown by the common law record. All the assignments of error here relate to matters that can be shown only by bill of exceptions or stenographic report, neither of which are included in the record.

The errors assigned not being disclosed by the record the judgment is affirmed.

JUDGMENT AFFIRMED.

377 - 18422.
378 - 18423.

185 I.A. 411

C. HULMER JOHNSON, Administrator of the Estate of William Peat, deceased, Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY, and SCHWARZSCHILD & SULZBERGER COMPANY, Appellants.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. PRESIDING JUSTICE CHAFEE DELIVERED THE OPINION OF THE COURT.

From a joint judgment in the Superior Court against the Chicago City Railway Company and the Schwarzschild & Sulzberger Company for $10,000 for negligently causing the death of appellee's intestate, William Peat, each company has prosecuted its separate appeal. These two appeals have been consolidated for hearing and determination and will be disposed of together.

The negligence charged in the declaration is that the railway company so carelessly, wrongfully and negligently drove, managed and operated its certain car upon which plaintiff's intestate was a passenger and the Schwartzschild & Sulzberger Company so carelessly, wrongfully and negligently drove, managed, operated and controlled its certain wagon and team of horses that through the carelessness and negligence of both, plaintiff's intestate was struck by the wagon and received injuries from which he died. As to the Schwarzschild & Sulzberger Company, it is further charged that its team was left unfastened and unattended in the street in violation of the City ordinance.

Briefly, the undisputed facts are that the deceased was riding on the front right hand step of the car in question, as it was being run westward on 47th street in the City of

Chicago, and that at a point from 30 to 75 feet west of State street, it collided with the wagon of the Schwarzschild & Sulzberger Company, and that in the collision the deceased received injuries from which he died.

The decided preponderance of the evidence establishes the following facts, viz.: That at a point about 50 feet west of the west curb line of State street the team of the Schwarzschild & Sulzberger Company stood hitched to a large wagon; that the rig consisting of this team and wagon was approximately 30 feet in length; that the wagon stood near the north curb line of 47th street with its rear end to the east; that the front end of the wagon was slightly farther from the north curb of the street than its rear end was, but far enough from the street car track to permit the car to pass with safety to the passengers thereon, including those standing on the steps of the car; that the horses were turned with their heads in a northwesterly direction and with their front feet on the side walk; that the deceased came south on a State street car and when that car stopped on the north side of 47th street, he alighted therefrom, and ran south and west to the front step of the car on which he received the injuries complained of, which car was then passing westwardly; that he got upon the step of the car when the car was in motion and when it was from 5 to 15 feet east of a point south of the wagon of Schwarzschild & Sulzberger Company; that at approximately the moment he gained the step the driver of the team in question who had driven the same to a point on the north side of 47th street, immediately north of where the deceased met his injuries, and had left it standing there unhitched and unattended, while he went into an adjacent saloon to get a drink, had his attention called to the fact that the team had gotten upon the side walk and that he then went out and in attempting to back them off from the side walk forced the wagon against the deceased and the car on

which he was riding, inflicting the injuries from which he died; that the motorman did not have time after the wagon began to back into the street and before it struck the car and the deceased to prevent the collision by the use of any means within his power; and that he had no warning or reason to expect that the wagon was about to be backed into the street or moved. In that state of the record a finding that the railway company was guilty of the negligence charged in the declaration is manifestly against the weight of the evidence.

While there was some conflict in the evidence on some of the foregoing propositions, we feel that the jury whose province it was to determine the facts was justified by the evidence in finding the Schwarzschild & Sulzberger Company guilty of the negligent management of the team, charged in the declaration, and we would affirm the judgment as to this appellant, if it were not for the fact that a joint judgment is a unit, and when it is reversed on the appeal of one defendant, it must be reversed as to all defendants. Valley v. Ill. Tunnel Co., 178 Ill. App., 386, and cases there cited.

A former judgment in this case against these same defendants was reversed by the Appellate Court, because there was no proof that the William Peat of whose estate appellee was administrator was the same William Peat who was injured in the collision, or that he died of the injuries there received and the cause was remanded to the Superior Court. See Johnson v. C. C. Ry. Co. et al., 166 Ill. App., 49. Appellee contends that by remanding the case the Appellate Court determined that there was evidence in the record that would warrant a finding by the jury that the railway company was guilty of the negligence charged in the declaration, and that such determination was res judicata and binding on the Superior Court and on this court in all subsequent proceedings, and cites Turck v. C. R. I. & P. Ry. Co., 152 Ill. App., 486;

Champaign County v. Reed, 106 Ill., 389; World's Col. Ex. Co. v. Lehigh, 94 Ill. App., 433; Weisel v. Green, 221 Ill., 187; Parisho v. Parisho, 95 Ill. App., 644; Clayton v. Reig, 188 Ill., 603; L. N. A. & C. v. Carson, 169 Ill., 347. If the evidence in the record on this appeal was the same as that in the record on the former appeal, there might be some force in this contention, but such is not the case. The record discloses that there were two witnesses at least who testified at the last trial to material matters who were not called at the former trial, and also that some of the witnesses at the last trial testified to matters not testified to by them at the former trial. The Supreme Court has frequently decided that an appellate tribunal, even on a second appeal of the same case, can have recourse only to the record presented on the pending appeal. Hartley v. C. & A. R. R. Co., 214 Ill., 78; C. B. & Q. R. R. Co. v. Lee, 87 Ill., 454; See also Ill. Cen. R. R. Co. v. O'Keefe, 188 Ill., 116, in connection with the same case in 154 Ill., 508, and Walsh v. Cullen, 235 Ill., 91, in connection with Cullen v. Higgins, 216 Ill., 78, where the facts disclosed by the record on a second appeal were held to warrant a different conclusion from that which the facts disclosed by the record on a former appeal warranted, and where the action of the court on the first appeal was disregarded by the same court on a second appeal.

Because the verdict in so far as it finds the Chicago City Railway Company guilty is manifestly against the weight of the evidence, the judgment is reversed, and inasmuch as the right of the Appellate Court to reverse with a finding of facts as to one appellant and reverse and remand as to another appellant in a joint judgment is extremely doubtful, the cause will be remanded as to both appellants.

If appellee had dismissed its case in the Superior Court as to the Chicago City Railway Company, the judgment against the Schwarzschild & Sulzberger Company could have been here affirmed and a retrial of the case averted.

The judgment is reversed and the cause is remanded to the Superior Court.

REVERSED AND REMANDED.

253 - 19648.
19648

185 I.A. 417

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

HOWARD ELLIS,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE GRAVES
DELIVERED THE OPINION OF THE COURT.

Plaintiff in error entered his plea of guilty to an information filed against him in the Municipal Court, in which it was charged that he "on the about the first day of January, A. D. 1913, at the City of Chicago, aforesaid, did then and there not being the parent or legal guardian or person having legal custody of him the said Ward Swalwell a dependent neglected or delinquent child did knowingly and willfully do such acts that did directly produce, promote and contribute to rendering the said Ward Swalwell, a minor child under the age of seventeen years to-wit fourteen years dependent and delinquent", contrary to the statute, etc. He was sentenced by the court to confinement in the House of Correction at labor and to pay the costs. He now contends that the information is insufficient to sustain the judgment for several reasons. First, because he is therein charged with having done "such acts" that did directly contribute to rendering the said Ward Swalwell a dependent and delinquent child, while what those acts were is not averred. Second, because it is not averred that Ward Swalwell was a dependent, neglected or delinquent child, "as defined by the statutes of this state". Third, because Ward Swalwell is averred to be a dependent, neglected "or" delinquent child, and that it is impossible to tell whether it is claimed by the State that he was dependent or neglected or delinquent.

Fourth, because the information fails to state the facts and conditions from which the pleader concluded Ward Swalwell was dependent, neglected or delinquent. On the part of defendant in error it is insisted that the information is substantially in the language of the statute creating the offense and, therefore, is sufficient under Section 408, Chapter 38, R. S., and that in any event the defects complained of can not be taken advantage of for the first time in the Appellate Court.

The last contention of defendant in error is correct as to all defects in the information that do not go to the real merits of the case on the question of the guilt or innocence of the accused. People v. Perce, 191 Ill. App., 866, and cases there cited. If, however, the information charges no crime or is in other respects fatally defective, such defect can be taken advantage of by writ of error after a plea of guilty, and regardless of whether the sufficiency of the information was in any way questioned in the trial court or not. Klawanski v. People, 218 Ill., 481; People v. Heine, 168 Ill. App., 502; Moore v. People, 26 Ill. App., 137. See also People v. Dragstran, 100 Ill., 286, and Wiggins Ferry Co. v. People, 101 Ill., 448; People v. Zlotnicki, 246 Ill., 185.

The statute on which this prosecution was based reads as follows:

"Any parent or parents, or legal guardian, or person having the custody of any dependent, neglected or delinquent child, as defined by the Statutes of this State, or any other person who shall knowingly or willfully encourage, aid, cause, abet or connive at such state of dependency, neglect or delinquency, or shall knowingly or willfully do any act or acts that directly produce, promote or contribute to the conditions which render such child a dependent, neglected or delinquent child as so defined, or who, having the custody of such child, shall, when able to do so, willfully neglect to do that which will directly tend to prevent such state of dependency, neglect or delinquency, or to remove the conditions which render such child either a neglected, dependent or delinquent child, as aforesaid, shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than two hundred dollars, or by imprisonment in the County jail, house of correction or workhouse, for not more than twelve months, or both by such fine and imprisonment," etc. See Section 42hb, Chapter 38, Hurd's Revised Statutes, 1911.

That section makes it a misdemeanor to knowingly or willfully do any acts that directly produce, promote or contribute to the conditions which render a child dependent, neglected or delinquent, or to knowingly and willfully encourage, aid, cause, abet or connive at such state of dependency, neglect or delinquency, as defined by the statutes of this state.

The words "dependent child", "neglected child", and "delinquent child", are defined in Section 168, Chapter 23, Hurd's R. S., 1911, as follows:

"For the purpose of this act, the words 'dependent child' and 'neglected child' shall mean any male child who while under the age of seventeen years or any female child who while under the age of eighteen years, for any reason, is destitute, homeless or abandoned; or dependent upon the public for support; or has not proper parental care or guardianship; or habitually begs or receives alms; or is found living in any house of ill-fame or with any vicious or disreputable person; or has a home which by reason of neglect, cruelty or depravity, on the part of its parents, guardian or any other person in whose care it may be, is an unfit place for such a child; and any child who while under the age of ten (10) years is found begging, peddling or selling any articles or singing or playing any musical instrument for gain upon the street or giving any public entertainments or accompanies or is used in aid of any person so doing.

"The words 'delinquent child' shall mean any male child who while under the age of seventeen years or any female child who while under the age of eighteen years, violates any law of this State; or is incorrigible, or knowingly associates with thieves, vicious or immoral persons; or without just cause and without that (the) consent of its parents, guardians or custodian absents itself from its home or place of abode, or is growing up in idleness or crime; or knowingly frequents a house of ill-repute; or knowingly frequents any policy shop or place where any gaming device is operated; or frequents any saloon or dram shop where intoxicating liquors are sold; or patronizes or visits any public pool room or bucket shop; or wanders about the streets in the night time without being on any lawful business or lawful occupation; or habitually wanders about any railroad yards or tracks or jumps or attempts to jump onto (any) moving train; or enters any car or engine without lawful authority; or uses vile, obscene, vulgar, profane or indecent language in (any) public place or about any school house; or is guilty of indecent lascivious conduct; any child committing any of these acts herein mentioned shall be deemed a delinquent child and shall be cared for as such in the manner hereinafter provided."

Under that section the terms "dependent child" and "neglected child" are made synonymous, but the term "delinquent

child" is given a very different meaning. A child may well be dependent or neglected and yet not be delinquent or the reverse.

The information in this case by way of recital merely speaks of Ward Swalwell in the alternative as being a "dependent, neglected or delinquent child", but there is no averment in it that he was either dependent, neglected or delinquent, nor is there any fact or facts averred from which the court can see that he belonged to either of the classes named. Every fact and circumstance stated in an indictment must be laid positively. Such facts can not be stated by way of recital. Wabash, St. L. & P. R. R. Co. v. People, 13 Ill. App., 448. Even if the recital quoted could be treated as an averment, it is left uncertain, whether he is a dependent, or neglected child, or is a delinquent child.

The law requires such certainty in an information or indictment that a defendant may know what he is charged with and be able to prepare his defense, and also to identify the offense sufficiently so that the judgment may be shown in support of a plea of former jeopardy or the like. Chedel v. People, 43 Ill., 328; Bishop on Criminal Procedure, Vol. 1, sec. 325.

"If the allegation is that the defendant did one or the other of two criminal things*****it is insufficient." Bishop on Criminal Procedure, Vol. 1, Sec. 325.

In negative averments the disjunctive conjunction or may, and often must be used, but in affirmative averments where terms that are not synonymous are used, certainty in the indictment requires the conjunction and to be used. See notes to Sections 97, 430, 514, 642, and 864, Bishop's Directions and Forms.

Again this information charges that plaintiff in error, "did*****do such acts that did directly produce, promote and contribute, etc." But what acts he is charged with doing is not averred. Whether he induced the parents of Ward Swalwell to abandon him and leave him homeless and dependent on the public for support which would render him a "dependent and neglected child", or induced the child to absent himself from his home or place of abode without just cause and without the consent of his parents, guardian or custodian, which would render him a "delinquent child", the information does not state. The averment that appellee "did*****do such acts that did directly produce promote and contribute, etc." is a pure conclusion of the pleader and is wholly insufficient. Bishop on Criminal Procedure, Vol. 1, Sec. 325; Wabash, St. L. & P. R. R. Co. v. People, 12 Ill. App., 448.

We are unable to concur in the contention of the State that this information is sufficient under the provisions of Section 408 of Chapter 38, R. S. That section provides:

"Every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct which states the offense in the terms and language of the statutes creating the offense, or so plainly that the nature of the offense may be easily understood by the jury."

The Supreme Court in Cochran v. People, 175 Ill., 28, says:

"Where the language of the statute describes the act or acts constituting the offense, no more is necessary than to state the offense in that language, as where the offense is having in possession instruments used in counterfeiting coin. In an indictment for that offense it was held sufficient to allege that the defendant had in his possession, knowingly and without lawful excuse, certain instruments and tools used in counterfeiting the coin current in this State, being in conformity to the definition of the crime in the Criminal Code. There the act constituting the offense was having in possession, etc., no matter by what means possession was obtained. And so in Loehr v. People, 132 Ill., 504, the indictment being for defacing and altering a book, the language of the statute being, 'if any judge,*****or any person whatever, shall***** alter, corrupt, withdraw, falsify or avoid any record,***** the person so offending shall be imprisoned in the penitentiary

not less than one nor more than seven years,' it was held sufficient to state the offense in the language of the statute, without specifying particularly how the alteration was made. Here, again, the offense consisted in the act of defacing or altering, no matter by what means or how it was done; and so as to the cases there cited, and many others relied upon by counsel for the People as sustaining this indictment. In another class of cases, where the act constituting the offense is committed by means of doing certain things, such as obtaining money by means of a confidence game, it has been held sufficient to charge that the accused did unlawfully and feloniously obtain 'money by means and by use of the confidence game'. These cases, however, are based either upon the express provision of the statute that it shall be deemed and held a sufficient description of the offense to charge that the accused did, on, etc., 'unlawfully and feloniously obtain or attempt to obtain (as the case may be) from A. B. his money by means and use of the confidence game,' or upon the theory that the term 'confidence game' has a well understood meaning, the use of which in an indictment sufficiently apprises the accused of what he is called upon to defend. Morton v. People, 47 Ill., 468; Maxwell v. People, 152 Id. 248."

The Cochran case was followed in People v. Clark, 256 Ill., 14, where the court said:

"The indictment must either by statutory description or by other apt averment so identify the offense as to meet the requirements of the constitution," which provides that persons accused of crime shall have the right to demand the nature and cause of the accusation and to have a copy thereof.

The information in the case at bar neither states the offense in the language of the statute, creating the offense, nor so plainly that the nature of the offense may be easily understood by the jury. It is, therefore, fatally defective in regard to averments that go to the real merits of the charge on the question of the guilt or innocence of the accused, and its sufficiency can be tested after a plea of guilty and whether the question was raised in the trial court or not. Klawanski v. People, supra; People v. Weiss, supra; Moore v. People, supra; People v. Bragstran, supra; Wiggins Ferry Co. v. People, supra.

The judgment of the Municipal Court is reversed and as the information is amendable (Bishop on Criminal Procedure, sections 714 and 715; People v. Zlotnicki, 246 Ill., 185;

Long v. People, 135 Ill., 435; People v. Burns, 146 Ill. App., 571; Bergstrasser v. People, 134 Ill. App., 608; Baxenbekler v. People, 83 Ill. App., 383), and as apparently the statute of limitation has not run against the charge intended to be made, the cause is remanded to the Municipal Court for further proceedings not inconsistent with the views here expressed.

REVERSED AND REMANDED.

254 - 19649.
17347

185 I.A. 420

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

HOWARD ELLIS,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE GRAVES
DELIVERED THE OPINION OF THE COURT.

Plaintiff in error entered his plea of guilty to an information filed against him in the Municipal Court, which charges that he "on the about 1st day of April, A. D. 1918, at the City of Chicago, aforesaid, did then and there not being the parent or Legal guardian or person having legal custody of one the said Edgar Miller a dependent neglected a delinquent child did knowingly and willfully do such acts that did directly produce promote and contribute in rendering the said Edgar Miller, a minor child under the age of 17 years, to-wit, 16 years dependent and delinquent", contrary to the statute, etc. Upon his plea of guilty he was sentenced to confinement at hard labor in the House of Correction for one year. He has brought the record to this court by writ of error and contends that the information is insufficient to support the judgment.

The information, record, abstract and contentions in this case are identical, except as to the use of the disjunctive "or" and the name of the child who is supposed to be dependent, neglected or delinquent, with those in the case of The People v. Ellis, ____ Ill. App., _____, (General No. 19648), in which case the opinion of this court is handed down simultaneously with this opinion. What is said in that opinion is conclusive on the questions involved in this case.

For the reasons there given this judgment is reversed and the cause is remanded to the Municipal Court.

REVERSED AND REMANDED.

334 - 19733.

185 I.A. 421

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

KARL BERNHARDT,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE GRAVES
DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was convicted in the Municipal Court on the charge of obtaining goods of the value of $743.75 by false pretense.

The facts disclosed by the evidence are as follows: Plaintiff in error purchased some goods of J. Lowitz & Company to be delivered to him at his place of business on the next day at four o'clock in the afternoon. On the morning of the day the goods were to be delivered, plaintiff in error went away from home, but returned before the time fixed for the delivery of the goods, and found that certain goods had already been delivered by Lowitz & Company. He claims they were not the goods ordered, but in the view we take of the case it is not material whether they were the same or not. When plaintiff in error went away from home that morning, he left with his wife a signed check which he directed her to cause to be filled out with the name of August Zeidman & Co. and with the amount of the bill of that firm for goods that were also to be delivered that day, and then to deliver it to that firm. This check was left blank as to the name of the payee and the amount because plaintiff in error did not know how to spell the name Zeidman and did not know the exact amount of the bill. The Zeidman bill in fact was for $58.25. The goods from Lowitz & Co. were delivered before those from Zeidman & Co. came, and the messenger demanded payment. The wife of

plaintiff in error told the messenger he had come too early; that her husband was away and would not be back until between three and four o'clock; that she had a check which plaintiff in error had left with her for another party. The messenger took the check and wrote in the name of Lowitz & Co. and the amount of the Lowitz & Co. bill, $743.75, and took it away with him. Plaintiff in error did not have that amount of money in the bank on which the check was drawn. When plaintiff in error found that his wife had delivered the check to the messenger of Lowitz & Co. and that it had been so filled out, he went to the bank and stopped its payment. The People attempt to justify the conviction on the authority of Burton v. People, 138 Ill., 405, in which case the court held that the purchase of goods to be delivered at a certain time and to be then paid for in cash, coupled with the giving of a check for the amount without any explanation, was in effect a representation that there was money in the bank on which the check was drawn sufficient to pay it.

The proof in the case at bar wholly fails to show that plaintiff in error delivered the check to Lowitz & Co., or authorized any one to do so for him or that when he made it out and left it with his wife he even contemplated the possibility that it might be so delivered to them. There is, therefore, no proof that plaintiff in error made any false pretense or that he committed the criminal act charged, or harbored any intent so to do.

The judgment of the Municipal Court is, therefore, reversed.

JUDGMENT REVERSED.

14 - 18164.

185 I.A. 422

ENRICO CHIAPPE, by F. J. Markis, his next friend, Defendant in Error,	ERROR TO
vs.	MUNICIPAL COURT
JOHN B. DEVONEY and RAFELO ARRIGO, Plaintiffs in Error.	OF CHICAGO.

MR. JUSTICE BAUME DELIVERED THE OPINION OF THE COURT.

This was a suit instituted in the Municipal Court by Enrico Chiappe, a minor, by his next friend, against John B. Deveney and Rafelo Arrigo to recover $100 alleged to have been paid by plaintiff to the defendants under the terms of a contract for the purchase and sale of certain real estate, which contract the plaintiff had elected to disaffirm. A trial by the court without a jury resulted in a finding and judgment against defendants for the amount claimed.

By the terms of the contract here involved the plaintiff, together with A. Chiappe and J. Linale, agreed to purchase and the defendant, Rafelo Arrigo, agreed to sell certain real estate for the agreed price of $9,200, $500 of which is recited as having been paid by the purchasers as earnest money to John B. Deveney, who was designated to retain said contract and said earnest money in escrow until the transaction was consummated.

The evidence discloses that only $500 was received by the defendant Deveney as earnest money under the contract, and that of this amount $100 was paid by the plaintiff or was the money of the plaintiff paid at his instance.

The right of the plaintiff to disaffirm the contract and to recover the money paid by him thereon is not controverted, but it is insisted that as the money in question was paid as earnest money upon a contract under seal signed by three persons

as purchasers, no recovery can be had thereon unless said three persons are joined as parties plaintiff.

This insistence ignores the rule that the plea of infancy is not available to the other parties to the contract, but is personal to the plaintiff alone. The right of an infant to avoid his contract is a personal privilege of which no one can take advantage but the infant himself. Neither third persons, the person with whom the contract was made, nor persons who are liable with the infant thereunder, can set up the infancy of one of the parties to avoid the contract, 22 Cyc., 609, 610.

If an avoidance or rescission of the contract was sought by a party upon grounds not predicated on a privilege personal to himself, a different rule would apply.

In Fuller v. Chuma Grocery Co., 241 Ill., 398, which involved the right of an infant to disaffirm his contract, it is said:

> "The exercise of his right to disaffirm his contract may operate injuriously or unjustly against the other party, but the right exists for the protection of the infant against his own improvidence and may be exercised entirely in his discretion."

In Kerr v. Bell, 44 Mo., 130, an infant and an adult entered into a contract whereby they agreed to purchase a tract of land. The infant elected to disaffirm the contract, and brought suit to enforce his disaffirmance and compel the restoration of the consideration paid by him, and it was held that the failure of the infant to join his adult co-contractor as a party plaintiff did not preclude his obtaining the relief sought.

We conclude that the co-contractors of the infant plaintiff in this case were not necessary parties plaintiff, and the judgment is affirmed.

JUDGMENT AFFIRMED.

33 - 18444.

185 I.A. 423

HARRY A. RHINEVAULT, Defendant in Error,	ERROR TO
vs.	MUNICIPAL COURT
CHARLES R. BARRETT, doing business under the name and style of Charles R. Barrett Company, Plaintiff in Error.	OF CHICAGO.

MR. JUSTICE BAUME DELIVERED THE OPINION OF THE COURT.

Defendant in error brought suit in the Municipal Court against plaintiff in error to recover a balance claimed to be due for work and material in constructing a spring coiling machine, and a trial by the court resulted in a finding and judgment against plaintiff in error for $375.

On February 10, 1911, plaintiff in error directed defendant in error to undertake the construction of the machine in question and defendant in error accepted the employment. Neither the price of the machine nor the terms of payment therefor were then considered, but the evidence tends to show that it was then contemplated that the machine would be completed and ready for delivery in about six weeks. From time to time following his undertaking to make the machine defendant in error furnished the material and with others employed by him performed the labor necessary to the construction of the machine. On May 19th plaintiff in error paid defendant in error $100 on account and on May 26th, when defendant in error applied to plaintiff in error for a further payment on account, plaintiff in error refused to make any further payment, except upon the condition that defendant in error would complete and deliver the machine by June 15th following at a total cost of not exceeding $500. Defendant in error refused to accept the conditions imposed and brought suit as stated. The machine was never completed and delivered to plaintiff in error, and

was valueless except as junk.

Conceding that the agreement provided for the construction and delivery of the machine within six weeks after February 10, 1911, it is clear from the evidence that plaintiff in error by his subsequent conduct waived such provision.

It is also clear from the evidence that the terms imposed by plaintiff in error on May 26th were impossible of performance by defendant in error, and that defendant in error was justified in abandoning the construction of the machine, and is entitled to recover from plaintiff in error the reasonable and customary value of the materials furnished and of the labor and services performed. The recovery must be upon a quantum meruit.

Practically the entire amount of the claim of defendant in error is for labor and services performed, and the only evidence in support of such claim is found in the testimony of defendant in error who gave a detailed statement of the number of hours devoted by himself and his employees to the construction of the machine, and who estimated the value of such labor and services at eighty cents an hour. There is not a scintilla of evidence tending to show the reasonable and customary value of such labor and services, or that the charge made by defendant in error for such labor and services was the reasonable and customary charge for like labor and services.

In the absence of any evidence tending to support a recovery under the only rule available to defendant in error relating to the measure of damages, the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

72 - 18516.

185 I.A. 424

JOHN H. McNALLY, Plaintiff in Error,	)	ERROR TO
vs.	)	SUPERIOR COURT,
LULU REGAN, Defendant in Error.	)	COOK COUNTY.

MR. JUSTICE BAUMS DELIVERED THE OPINION OF THE COURT.

This writ of error is prosecuted by John H. McNally to review the record of a proceeding in the Superior Court, where a bill filed by him against Lulu Regan and Christopher Strassheim, former sheriff of Cook County, and Michael Zimmer, present sheriff of said county, praying for an injunction and for relief against a judgment at law and for a new trial, was, upon a hearing by the Chancellor, dismissed for want of equity.

The bill alleges that on or about February 20, 1907, complainant, then a police officer of the City of Chicago, arrested the defendant, Lulu Regan, for disorderly conduct in violation of Section 1434 of the Municipal Code; that in making said arrest he used no physical force or violence, but conducted himself as became his duty under the circumstances; that thereafter upon the hearing of said cause against said defendant for violating said ordinance, she was acquitted; that afterwards, on Nov. 4, 1907, said defendant instituted suit in the Superior Court against complainant for trespass alleging that complainant assaulted, beat and ill-treated her; that such proceedings were had in said suit at law, that on April 10, 1909, said defendant recovered a judgment against complainant for $1,500, and costs of suit; that upon the trial of said case in the Superior Court the testimony of said defendant, upon which said judgment was based, was to the effect that she had never been sick prior to the injuries she claimed to have sustained at the hands of the complainant at

the time of her arrest and had never taken a tonic during her life, but that since said arrest and in consequence thereof she had been constantly ill, and suffered from certain physical ailments and disabilities which made it impossible for her to perform her ordinary labor and duties. The bill further alleges that the said testimony of the defendant as to her physical condition was not cumulative, but was the sole evidence in the case regarding her physical condition and bearing upon the question of damages resulting therefrom; that the said testimony of the said defendant was false, untrue and perjured; that while the said defendant testified that she had never before been ill, the facts are that on or about May 14, 1899, the said defendant, while a passenger upon a west-bound Van Buren street electric car, was seriously injured by a collision between said car and a patrol wagon on said Van Buren street near Hoyne avenue; that by reason of said collision she was thrown out of said car and struck the pavement on her head, chest and knees and struck the car with her left shoulder and for a time was rendered unconscious; that she preferred a claim against the Chicago Union Traction Company, which ran and operated said car, for damages resulting from her said injuries, and in her said claim against the said company, she alleged the same or similar injuries to those which she alleged against complainant upon the trial of the case against him; that as a result of her said injuries and of her claim because thereof, the West Chicago Street Railway Company, which was then and there consolidated with the Chicago Union Traction Company, paid to her on September 21, 1899, in settlement of her said damages, the sum of $300, and that she then executed a release to the said West Chicago Street Railway Company, in which she acknowledges the payment of said sum of $300 in compromise and satisfaction for all injuries and loss or damage sustained or suffered in mind, body and estate by reason of

an accident which occurred to her on or about the 14th day of May, 1899, at or near Hoyne avenue and Van Buren street, in which her forehead was cut, her left shoulder was sprained, her left knee injured, and she was otherwise bruised and injured internally, suffering a severe nervous shock; that notwithstanding the said testimony of the defendant given upon the trial of said case that she had never before been ill, complainant alleges that on July 3, 1899, she was taken to the Presbyterian Hospital in the City of Chicago, and remained there for a period of three weeks and that she was then and there suffering from nervousness, hysterical attacks, enlargement of lymph glands, erysipelas in her knee and uterine troubles; that upon the trial of said case she testified that as a result of said injuries she became highly nervous, and her menses stopped and did not again occur for six weeks and that after said six weeks she was irregular in her menstruation and that the same was thereafter accompanied with much pain; that she then further testified that prior to said alleged assault her menstrual period had always been regular and always recurred every twenty-eight days and had never varied since her menstruation began in early life, and that she had never before been nervous, whereas, in fact, complainant alleges that as a result of the collision when she was a passenger on said street car as aforesaid, she was so badly injured that her menstruation ceased and from that date, to-wit, May 14, 1899, to September 6, 1899, had not again occurred and in her claim for damages against said street car company she alleged and claimed damages because thereof, and that she also became highly nervous and was confined in a hospital because of her nervous and hysterical condition.

The bill further alleges that complainant made every reasonable effort prior to the trial of said case, and while said Superior Court had jurisdiction thereof, to ascertain the

history of said defendant; that he had never seen defendant prior to the time he placed her under arrest as aforesaid, and knew nothing of her or her antecedents or of her friends or companions; that shortly after her arrest and about the time of the commencement of said suit by her against complainant she left Chicago and thereafter resided in Olean, New York, until about the time of her said trial, so that it was impossible for him to procure evidence of her condition during that time, and complainant did not know till the trial that she had been out of the city; that during all of the time his case was pending in said Superior Court complainant made diligent search to ascertain the whereabouts of said defendant and was unable to find her or to obtain any information concerning her or her whereabouts or to find any witnesses who knew her; that he knew nothing of her injuries by reason of said accident until long after the trial and ascertained the same on or about the 23rd day of March, 1910, and that he then discovered it by accident through a person who had heard of said street car occurrence; that complainant immediately began an investigation thereof with the result that he discovered the matters and things above stated and charged.

The bill further charges that said judgment entered against him as aforesaid, by said Superior Court, is unjust and unconscionable and all the proof of damages therein was said false and perjured evidence given as aforesaid by said defendant; that no other witness testified at said trial to the physical condition of said plaintiff, except said plaintiff herself, or that her said alleged condition resulted from the alleged assault therein mentioned; that said alleged damages sustained by the plaintiff were based entirely upon the said false and perjured evidence given by said plaintiff; that at the time of said arrest the complainant in full police uniform, was a passenger on the street car in said city, upon which said defen-

dant, Lulu Regan, was also a passenger, between twelve and one o'clock A. M., that she was then and there loud and boisterous and created an unusual noise and disturbance and breach of the peace and was throwing candy at various passengers in the car, and struck complainant himself several times with said candy; that complainant remonstrated with her on two different occasions, and asked her to be quiet, but she persisted in her loud, boisterous actions, and complainant again remonstrated with her and she again refused and continued to throw candy at the different passengers in the car, whereupon complainant placed her under arrest and removed her from the car and turned her over to the officer in charge of the patrol wagon at the Thirty-fourth street police precinct; that had the defendant testified truthfully upon said trial or had the complainant been in possession of said information concerning said defendant, she would not have obtained said judgment against him. The bill further alleges that on March 1, 1910, said defendant caused to be issued out of the Superior Court a capias ad satisfaciendum directed to the Sheriff of said Cook County, ordering him to take the body of complainant, etc., in pursuance to the statute in such case made and provided.

Upon the filing of said bill an order was entered restraining Christopher Strassheim, the then sheriff of Cook County, from executing said writ of capias ad satisfaciendum. Thereafter the defendants interposed their motion to dissolve said injunction, which motion was denied.

The defendants in error have filed no brief and argument in this court.

The allegations of the bill in the following respects are established by uncontroverted evidence; that defendant in error, Lulu Regan, testified in the suit at law that the injuries and illness complained of resulted solely from the conduct of plaintiff in error; that she then persistently denied

that she had ever sustained any injuries or suffered any illness prior to her arrest by plaintiff in error; that prior thereto she had sustained injuries in a street car collision and had made a claim therefor against the street railway company, which claim was settled by her upon the payment of $300; that the injuries and illness then claimed by her to have resulted from the street car collision were precisely the same in character and extent as the injuries claimed by her upon the trial of the suit at law against plaintiff in error to have resulted from the conduct of plaintiff in error; that immediately after the commencement of her suit against plaintiff in error said defendant in error left the City of Chicago and went to the State of New York, where she remained until said case was reached for trial; that plaintiff in error made diligent search for said defendant in error after the commencement of her suit against him, but was unable to ascertain her whereabouts or to obtain any information concerning her; that the facts relating to the injuries sustained by said defendant in error in the street car collision and her consequent illness, were not known to plaintiff in error until just prior to the filing by him of this his bill for relief.

The jurisdiction of a court of equity to grant relief against a judgment obtained by fraud, accident or mistake, where there has been no negligence on the part of the defendant and the rights of third parties have not intervened is not now open to question. In Miller v. Barto, 247 Ill., 104, the rule is stated thus:

"If it is against conscience to execute a judgment and the defendant was prevented from making his defense by fraud or accident unmixed with any fault or negligence in himself or his agents, and the rights of third parties have not intervened, equity will relieve against the wrong." See also Hilt v. Heimberger, 235 Ill., 336.

That the judgment in the suit at law was for substantial damages awarded to said defendant in error for injuries and illness falsely and fraudulently avowed by her upon the trial to have resulted from the conduct of plaintiff in error does not, upon this record, admit of doubt. It is also clearly established that plaintiff in error was without fault or negligence in failing to ascertain and present to the court and jury the then existing evidence of facts which would doubtless have availed to prevent the recovery of the judgment complained of. Upon the admitted facts the execution of the judgment in question is unconscionable.

The decree is reversed and the cause remanded with directions to enter a decree in accordance with the prayer of the bill.

REVERSED AND REMANDED.

107 - 18555.

JOHN REEM,
Defendant in Error,

vs.

CLARENCE S. VIALL,
Plaintiff in Error.

185 I.A. 425

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

In an action in replevin brought in the Municipal Court by defendant in error against plaintiff in error to recover possession of an automobile a trial by the court resulted in a finding and judgment against plaintiff in error.

The uncontroverted facts are substantially as follows: On November 28, 1911, defendant in error, an automobile salesman, sold an automobile to William C. Foster, who, in part payment therefor, then gave his notes and a chattel mortgage on the automobile to defendant in error. On the same day defendant in error and Foster took the automobile to the garage of plaintiff in error, where Foster, at the suggestion of defendant in error, arranged with plaintiff in error to keep and care for the automobile in his garage, for $8 a month, payable in advance. The chattel mortgage was not recorded until December 8, 1911, and plaintiff in error had only constructive notice of such mortgage. The mortgage provided that it should be lawful for the mortgagor, Foster, to retain possession of the automobile, and at his own expense to keep and use the same, until default, etc. During the period of three and one-half months that the automobile was kept in the garage of plaintiff in error, Foster drove and used the same at his pleasure and plaintiff in error supplied the gasoline and lubricating oil necessary for its operation and from time to time furnished the materials and performed the labor required in making necessary repairs on the automobile. Foster having defaulted in the payment of his notes to defendant in error, the latter elected

to take possession of the automobile under his chattel mortgage, and demanded possession of the same from plaintiff in error, who refused to surrender possession unless his bill for supplies, repairs and storage, amounting to $109.45, was paid, and claimed a lien on the automobile for the payment of his bill.

The only lien, if any, which plaintiff in error may assert is the lien given by the common law. There is no statute which gives to plaintiff in error a lien for any of the charges here involved. By the common law a mechanic or artisan who by his skill and labor has enhanced the value of a chattel has a lien on it for his reasonable charges, provided the employment be with the consent, either express or implied, of the owner. 1 Jones on Liens, Sec. 731.

It is clear, therefore, that plaintiff in error can not assert a lien upon the automobile for his charge of $8 a month for keeping and caring for the same in his garage, or for supplies, such as gasoline and oil, furnished by him to Foster during the time the automobile was kept in the garage.

Whether the common law lien of a mechanic or artisan takes precedence of the lien of a previously recorded chattel mortgage depends upon the circumstances attending the creation of the lien. 1 Jones on Liens, Sec. 744. While the mortgagor cannot by contract create such a lien so as to give it priority over the lien of a previously recorded mortgage, the mortgagee's authority for the creation of such a lien may be implied. Such implication may arise where the property is to be retained and used by the mortgagor, and is of a character which involves the occasion for the making of ordinary repairs thereto as a necessary incident to its reasonable and customary use by the mortgagor. The application of this rule is concretely illustrated in Hammond v. Danielson, 126 Mass., 294; Watts v. Sweeney, 127 Ind., 116; and Drummond Carriage Co. v. Mills, 54 Neb., 417.

In its application this rule is, however, subject to the well settled rule that such common law lien can only be asserted as against a third party when the property is retained in the actual and continuous possession of the lien claimant, his agent or servant. 1 Jones on Liens, Secs. 30, 31, 32; Smith v. O'Brien, 94 N. Y. Suppl., 673, affirmed in 103 N. Y. App. Div., 596.

Of course, as between the immediate parties a change of possession does not defeat the right of a lien claimant to assert a lien, unless by surrendering possession he can be fairly understood to have surrendered his lien. 1 Jones on Liens, Sec. 28.

Where, therefore, as in the case at bar, plaintiff in error surrendered possession of the automobile to Foster after making such of the repairs, if any, as were not shown to have been made at the instance and by the direction of defendant in error, he must be held to have lost his right to assert a lien therefor.

Plaintiff in error testified that upon the occasion when defendant in error and Foster first brought the automobile to his garage on November 28, 1911, the clutch was not working properly and that he fixed the same at the request of defendant in error, but, so far as the evidence discloses, he made no separate charge for such work. The charge then made by him was for "oil, kerosine and time $1.25", and was made to Foster. There is some evidence offered by plaintiff in error tending to show that other repairs were subsequently made at the instance and by the direction of defendant in error, but upon this issue the evidence taken as a whole merely shows that such repairs were made with the knowledge of defendant in error. The charges for such repairs were made to Foster and not to defendant in error, and it does not appear that plaintiff in error conceived the intention of holding defendant in error

liable therefor or of retaining possession of the automobile until Foster evidenced his inability to pay for the repairs.

McGlasson v. Hennessy, 161 Ill. App., 387, relied upon by plaintiff in error involved the assertion by the claimant of a statutory stable keeper's lien, and is, therefore, not in point.

We perceive no error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

137 - 18579.

185 I.A. 427

HELEN MILLER, Defendant in Error,	ERROR TO
vs.	MUNICIPAL COURT
MAYBELLE BAYLIS, Plaintiff in Error.	OF CHICAGO.

MR. JUSTICE BAUMS DELIVERED THE OPINION OF THE COURT.

This is a suit instituted in the Municipal Court by defendant in error against plaintiff in error to recover damages for the breach of a contract of employment, whereby it is alleged plaintiff in error agreed to employ defendant in error as a millinery designer for a period ending January 7, 1912, and from which employment defendant in error claims that she was wrongfully discharged on October 31, 1911. A trial by the court resulted in a finding and judgment against plaintiff in error for $150. There is no appearance in this court by defendant in error.

Defendant in error entered the employ of plaintiff in error in September, 1911. The evidence introduced on behalf of defendant in error tends to show that the contract of hiring was for the period ending January 7, 1912, at $25 per week, while the evidence introduced on behalf of plaintiff in error tends to show that when she employed defendant in error the period of such employment was not mentioned, and that plaintiff in error then said that such employment would continue indefinitely if the services of defendant in error proved satisfactory. While the evidence bearing upon this issue is close, we are not prepared to say that it did not warrant a finding by the court that the contract in question was an entire one as claimed by defendant in error.

Defendant in error testified that on Saturday, October 21, 1911, she was told by plaintiff in error that she did not like her work and did not want her, and, "to quit". Nettie Wiley, an intimate friend of defendant in error through whose influence plaintiff in error was induced to employ defendant in error, testified on behalf of defendant in error that a few days before October 21, 1911, plaintiff in error told her that she was going to "fire" defendant in error, but she further testified that she did not tell defendant in error of the conversation which she had with plaintiff in error.

Plaintiff in error testified that prior to October 21, 1911, the work done by defendant in error had been unsatisfactory and that many of the hats trimmed by her had been returned by customers, and were required to be retrimmed; that on that day after a customer had returned a hat which had been trimmed by defendant in error, plaintiff in error called defendant in error into her office and told her she had received so many complaints about her work that she was getting dissatisfied and that defendant in error would have to do better if she expected to continue the work; that defendant in error then cried and said she felt she couldn't make good, but would try and do better; that defendant in error then went into the work room and after she left the establishment that evening plaintiff in error did not see her again until the trial of the case; that she did not tell defendant in error to quit, or that she did not want her, or words to that effect; that anticipating the return of defendant in error on the Monday following she laid out work to be then done by defendant in error upon the table customarily used by her; that when defendant in error left her establishment on that evening she made no demand for the wages due for the previous week's work, and left her working tools in the work room.

This testimony of plaintiff in error is corroborated in every essential detail by the testimony of two witnesses

who claim to have been present at, or within hearing of, the conversation between defendant in error and plaintiff in error upon the occasion in question, and who were familiar with the character of the work done by defendant in error.

Defendant in error offered no testimony in contradiction of the evidence adduced by plaintiff in error as to the character of the work performed by defendant in error.

The finding of the trial court that the defendant in error was discharged by plaintiff in error from her employment on October 21, 1911, is against the clear preponderance of the evidence and the facts and circumstances in evidence in the case, but if it be conceded that defendant in error was so discharged a clear preponderance of the evidence tends to show that such discharge was not wrongful.

It is insisted by counsel for plaintiff in error that where an employment is entered into for a specific time at a fixed salary, that in an action to recover damages for a breach of such contract the burden is on the plaintiff to show that the discharge was without just cause. This is not a correct statement of the rule. In Hofstetter v. Cash, 104 Ill. App., 455, the employee voluntarily quit the service of his employer and the rule as so there stated was inapplicable to the facts there involved, and was apparently so stated without due consideration. The true rule is that the burden of showing good and sufficient grounds for discharge rests upon the employer invoking such a defense, when the servant has proven the contract, its performance up to the time of his discharge and his readiness to perform at the time of the discharge. Ludwick v. Root & Vandervoort Co., 148 Ill. App., 633, and cases there cited. See also Parter v. Board of Education, 161 Ill. App., 284.

Prior to her employment by plaintiff in error defendant in error was employed in Indianapolis under a written

contract for the period of one year from January 7, 1911, at a salary of $1,200 per year. This written contract was introduced in evidence by defendant in error over the objection of plaintiff in error and it is insisted that such contract was improperly introduced in evidence and considered by the court.

If, as there is some evidence tending to show, the only terms of the employment were that defendant in error would have the same time and salary she was then getting, and the period of her employment was not mentioned, the contract was competent for the purpose of fixing the terms of her employment, but if it was then known and understood that the contract of employment of defendant in error at Indianapolis extended to January 7, 1912, (and it is inconceivable that plaintiff in error would have employed defendant in error for the same period mentioned in the written contract without first ascertaining what the written contract provided in that respect), the contract was incompetent and should have been excluded. In other words, unless the terms of the Indianapolis contract were in controversy, such contract was foreign to any issue in the case, and was incompetent as evidence.

While the specific reasons urged by plaintiff in error in support of her objection to the testimony of the witnesses, Tuttle and Swartz, are untenable, such testimony should have been directed to the general reputation of defendant in error as a first class designer and trimmer.

Because the finding of the court is not supported by the evidence the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

153 - 18609.

185 I.A. 428

LEON KRUSZCZYNSKI, Appellee,	APPEAL FROM
vs.	SUPERIOR COURT
HANLEY BOILER AND TANK COMPANY, a corporation, Appellant.	COOK COUNTY.

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

In a suit by Leon Kruszczynski against the Hanley Boiler and Tank Company, a corporation, to recover damages for personal injuries, a trial by jury in the Superior Court resulted in a verdict and judgment against the defendant for $4,000, to reverse which judgment it prosecutes this appeal.

The declaration consisting of one count alleges, in substance, that on or about March 19, 1910, the defendant was engaged in manufacturing steel boilers and tanks and operated a plant in which plaintiff was employed as a common servant; that in said plant there was in use a certain flat truck, with loose rails laid on the top thereof, which was used to move heavy iron plates around the shop; that it was the duty of the defendant to use all reasonable care to provide the plaintiff with a safe place and suitable utensils, appliances, trucks and rails fastened thereon, for the purpose of removing or transferring the iron plates around the shop and not to have directed, ordered or compelled the plaintiff and other servants to use the aforesaid flat truck with loose rails thereon, in the moving of plates; that the defendant did not regard its said duty, but, on the contrary, while plaintiff was employed as aforesaid, using all reasonable care for his own safety, negligently had constructed, kept and maintained, and used and required the plaintiff to use the aforesaid flat truck

with rails loose and unfastened to the top thereof, and then and there negligently ordered and directed the plaintiff and other servants to place the heavy sheet of iron upon the loose rails of said truck and negligently failed to provide plaintiff with a safe place in which to work, and carelessly ordered the plaintiff and its servants to push or shove said large or heavy plate along, over and upon the said loose rails; all of which dangerous and unsafe condition was known to the defendant or could have been known by reasonable care, and was not known to the plaintiff, nor by the exercise of reasonable care could he have known it; that while plaintiff was working under the directions and orders of a foreman or superior servant of the defendant, in obedience to his orders, and while in the exercise of all reasonable care for his own safety, and while he and the other servants of the defendant were pushing or shoving said large and heavy iron plate along, upon and over the loose rails, said loose rails did wear, tip and fall, and said large iron plate slid, veered and fell from off the loose rails and said plate and one of the loose rails fell and struck against the leg of the plaintiff, breaking the bones of the plaintiff's leg, etc.

Upon the floor of appellant's rolling mill a track was laid upon which the employees operated an ordinary platform truck, whereon material used in the construction of boilers and tanks was conveyed from one portion of the mill to another as occasion required. When large steel plates were required to be thus conveyed upon the truck two railroad rails were usually placed upon the platform of the truck and the steel plate or plates were then laid upon such rails. The rails were not fastened to the platform of the truck and no device was employed to prevent the rails from sliding off or being pushed off the platform. The truck was about 7 or 8 feet long and 6 feet wide, and the railroad rails were placed

lengthwise of the truck and extended some distance beyond the ends of the truck. At the time of his injury appellee was employed as a common laborer and as a boilermaker's helper and had been so employed for about a week. He speaks and understands the English language very imperfectly and testified upon the trial through an interpreter. During the time of appellee's employment, one Lumpp was the general shop foreman, and one Richards, was the boilermaker, but upon the occasion of appellee's injury Lumpp was confined to his home by illness and appellee and his co-employees had been directed by him to obey the orders given by Richards and do as he told them, and Richards was then acting as the boss or foreman of appellee. Upon the occasion in question appellee and his fellow servant, Draghos, at the direction and with the assistance of Richards, placed a large triangular shaped steel plate on the rails then laying upon the platform of the truck, and pushed the truck to the place where it was desired to unload the plate. When the truck arrived at its destination, Richards, Draghos and appellee under the direction of the former proceeded to unload the plate by lifting and pushing or shoving it off the south side of the truck, and while doing so Richards and appellee handled the plate on the south side of the truck and Draghos handled it on the north side of the truck. The weight of the plate is variously estimated at from 350 to 400 pounds. At some time while the men were thus engaged in unloading the plate Richards called out, "slip it over", or "shove it over", or "let her go", and in response to the efforts then made the plate slid off from the platform on the south side of the truck and in so doing overturned and carried with it one of the railway rails which fell upon appellee's leg and thereby occasioned the injuries complained of.

There is evidence tending to show and the jury were not unwarranted in finding that prior to the occasion when

he was injured appellee did not know that the rails were not securely fastened to the platform of the truck; that he had never before assisted in the work of loading the truck or carrying material thereon when the rails were on the platform; that the direction or order given by Richards to appellee and his fellow servant with reference to the method to be employed in unloading the plate, was repeated by him several times in a peremptory and angry manner.

It is insisted that appellee must be held to have assumed the risk arising from the presence and use of the loose or unfastened rails on the truck platform. This insistence is necessarily predicated upon the theory that the condition of the rails in that respect and of the danger arising therefrom was open and obvious to appellee or was readily ascertainable by him in the exercise of reasonable care. If, as appellee testified, he had never before used the truck when the rails were upon it, and had never had occasion to observe whether or not the rails were fastened to the platform his failure to observe the condition of the rails in that respect can not be said as a matter of law to charge him with the want of reasonable care. Upon the occasion in question, as the rails upon the platform were covered by the steel plate, a view of such portion of the rails as would ordinarily be fastened to the platform was obscured by the steel plate, and the condition of the rails in that respect was only observable upon close scrutiny and inspection. Under these circumstances, and independent of any other condition which might operate to relieve appellee of his assumption of the risk, the question was fairly one of fact for the jury.

It is clearly established by the evidence that in the absence of Lumpp, the regular foreman, the duty of directing the character of the work to be performed by appellee and the manner of its performance was entrusted to Richards, and

that appellee was bound to obey the directions and orders given by Richards in these respects. The mere fact that Richards had no authority to hire and discharge men does not necessarily make him other than a vice principal. The question was one of fact for the jury. Chicago, R. I. & P. Ry. Co. v. Ruthnesu, 325 Ill., 378.

If, upon a consideration of the evidence the jury might without acting unreasonably in the eye of the law find that the approximate cause of the injury to appellee was the giving by Richards, as vice principal, of a peremptory and negligent order, then the doctrine of assumed risk is not available to appellant as a defense, even though in the absence of such an order the defense of assumed risk would be available to appellant. Springfield Roller & Mfg. Co. v. Parks, 222 Ill., 355. Again, while the mere fact that the rails were loose and unfastened upon the truck might not justify a finding that appellant was guilty of negligence, appellant can not avoid liability arising from a negligent and peremptory order to appellee to perform the work. It may well be that if the steel plate had been unloaded from the truck by lifting and carrying it therefrom, or if it had been shoved off while resting upon the edge of the platform, the fact that the rails were loose and unfastened would have been without significance, but when the heavy steel plate was directed to be shoved or pushed off while resting upon a loose and unfastened rail, it might not unreasonably be anticipated that the rail would be overturned and fall from the truck.

It is said, however, that the verdict must have been predicated upon some ground of liability other than that arising from the conduct of Richards as a vice principal, because the jury were specifically instructed by the court, at the instance of appellant, that under the evidence Richards and appellee were fellow servants as a matter of law, and

that defendant could not be held liable for any act of negligence on the part of Richards. The court did so instruct the jury with reference to the relation existing between appellee and the "boilermaker", and there can be no question under the evidence that the person referred to in the instruction as the "boilermaker" was none other than Richards. As we have heretofore said, whether or not Richards and appellee were fellow servants was under the evidence a question of fact for the jury, and the instruction was, therefore, more favorable to appellant than was warranted. In this at te of the record what was said in Luken v. Lake Shore & Mich. So. Ry. Co., 248 Ill., 377, is most pertinent. It was there said: "A verdict will not be disturbed which is in concordance with the law and the evidence, even if it is contrary to erroneous instructions given at the request of the party against whom the verdict is rendered."

But there is another view of the case, not inconsistent with the propriety of said instruction, which warranted the jury in awarding damages against appellant. There is evidence tending to show and the jury were not unwarranted in finding that appellant was negligent in failing to exercise reasonable care to provide a reasonably safe truck with reasonably safe appliances for the performance by appellee of the work in which he was engaged. If it be conceded that in assisting appellee in the work of unloading the steel plate, Richards was, as a matter of law, a fellow servant of appellee, as is announced in the instruction, yet a recovery by appellee would not be barred if his injury resulted from the negligence of Richards concurring with the negligence of appellant. Pittman v. C. & E. I. R. R. Co., 231 Ill., 581.

The errors assigned and argued do not question the rulings of the court upon the evidence or instructions, nor is it urged that the verdict is excessive.

The issues involved were properly submitted to the jury and we can not say that their determination of such issues was unwarranted.

The judgment is affirmed.

JUDGMENT AFFIRMED.

164 - 18600.
18.20

THE STANDARD BREWERY, A corporation,
Plaintiff in Error,

vs.

JOHN F. SWEENEY,
Defendant in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HAINE DELIVERED THE OPINION OF THE COURT.

The Standard Brewery, a corporation, brought suit in the Municipal Court against John F. Sweeney, to recover $337.50, alleged to be due for beer sold and delivered. The defendant admitted his liability to the amount of $ 13.50, and claimed a set-off for $700 for alleged agreed commissions for procuring customers with whom plaintiff entered into contracts for the sale and purchase of beer manufactured by it. A trial by jury resulted in a verdict and judgment against plaintiff for $536.50, upon defendant's claim of set-off.

The substantive evidence in the record of the alleged contract for commissions, which is the basis of defendant's claim of set-off, consists of the testimony of defendant as to a conversation had by him with one, Gaynor, a soliciting agent employed by the plaintiff, who it is conceded died subsequent to said alleged conversation and before the trial of the case.

Over the timely and specific objection of plaintiff the defendant was permitted to testify to the conversation had by him with Gaynor, as follows:

"Gaynor said to me, 'We would like to have somebody represent us here.' I asked him what he would pay, and he said, 'I will give you $350 for every customer you get that will sell from one to two barrels of beer a day, and I will give you $500 for every customer using from three to five

barrels,' and I said, 'I will, Mr. Gaynor,' and as I is, 'Furthermore, if you can find any customer - any man we can buy that is not tied already with some other brewery with a contract, you let us know, and we will come and will investigate and we will buy, or we will give you the money to buy him out, and we will pay you so much for it.'"

Section 4 of the act relating to evidence and depositions, provides, in part, that "in every action, suit or proceeding a party to the same who has contracted with an agent of the adverse party, - the agent having since died, - shall not be a competent witness as to any admission or conversation between himself and such agent, unless such admission or conversation with the deceased agent was had or made in the presence of a surviving agent or agents of such adverse party." Hurd's Stat., 1911, p. 1157.

The record discloses that the trial court overruled the objection of plaintiff upon the ground that the words "adverse party", as used in the statute were not applicable to a corporation, and held that as the plaintiff was a corporation, the defendant was not inhibited by the statute from testifying to a conversation with the deceased agent of the plaintiff. There is no pretense that the testimony of defendant was competent within any of the express exceptions to the statutory prohibition.

Defendant does not here seriously attempt to sustain the ruling of the trial court in its interpretation of the statute, and it is obvious that such ruling cannot be sustained. A corporation plaintiff or defendant is as much an "adverse party" within the meaning of the statute, as is a co-partnership or an individual plaintiff or defendant. The precise question does not appear to have ever been previously even mooted, but if authority be necessary it will be found in numerous cases in which the statutory inhibition has without

question been applied to evidence of conversations with deceased agents of a plaintiff or defendant corporation. Zeigler v. Clinton Nat. Co. Fire Ins. Co., 94 Ill. App., 442; Rothstein v. Siegel, Cooper & Co., 10[illegible] Ill. App., 600; Helbig v. Citizens Ins. Co., 100 Ill. App., 59; Sune v. Sune, 184 Ill., 201; Grand Lodge A. O. U. W. v. Young, 173 Ill. App., 628; Edwards v. Oil City B. & S. Ass'n, 137 Ill. App., 500; Cohen-Schwartz R. & S. Co. v. K. St. L. Loco. & M. B. Co., 158 Ill. App., 645.

Furthermore, the word "party", as used in the section of the statute above quoted, may, upon the authority of general rule No. 5 for the construction of statutes, properly be held to include a body politic or corporate. Said general rule No. 5 is as follows: "The word 'person' or 'persons', as well as all words referring to or importing persons, may extend and be applied to bodies politic and corporate, as well as individuals." Hurd's Stat. 1911, p. 1268. "Party" like the word "person" is a generic word of comprehensive nature.

The alleged contract, if established by competent evidence, was a proper subject of set-off. The damages, if any, were liquidated. Defendant claims to have secured one customer, Solon & Murphy, who, under a contract with plaintiff, sold from one to two barrels of beer a day, for which service defendant was to have received $250; and another customer, Koch, who under contract with plaintiff sold from three to five barrels of beer a day, for which service defendant was to have received $500. That extrinsic proof was necessary to establish the claim of defendant that said customers had sold the requisite number of barrels of beer, did not render the damages unliquidated. East v. Cross, 70 Ill., 91; Ideal Coated Paper Co. v. Cupples Mfg. Co., 169 Ill. App., 484.

Proof of the number of barrels of beer sold by said

parties should be made by the best evidence available.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

2OC - 18658.

DANIEL J. COYNE and RICHARD COYNE, trading as COYNE BROTHERS, and GEORGE C. BOYER and P. H. MOTTSHAND, trading as MONTCALM POTATO COMPANY,
Defendants in Error,

vs.

GRAND RAPIDS AND INDIANA RAILWAY COMPANY, a corporation,
Plaintiff in Error.

185 I.A. 431

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BAUNE DELIVERED THE OPINION OF THE COURT.

Defendants in error recovered a verdict and judgment in the Municipal Court against plaintiff in error, Grand Rapids & Indiana Ry. Co. for $258.58, damages, occasioned by delay in transporting two cars of potatoes from Big Rapids, Michigan, to Chicago.

The material facts are not controverted. On June 14, 1911, plaintiff in error issued its bills of lading for two cars of potatoes to be transported by it for delivery to the consignee, Montcalm Potato Company, on the track of the Chicago & Northwestern Ry. Co. at Chicago. The cars were forwarded on the road of plaintiff in error and of the Pennsylvania Company and arrived on the tracks of the latter company at 55th street in Chicago on June 17th. In the meantime the C. & N. W. Ry. Co. had been directed by defendants in error to notify Coyne Brothers of the arrival of the cars and to allow inspection, and Coyne Brothers immediately sought for the cars on the tracks of the C. & N. W. Ry. Co. and were notified by the officials of that company that they had no record of the cars. The cars were not delivered by the Pennsylvania Company to the C. & N. W. Ry. Co., but on the evening of June 20th the Pennsylvania Company mailed to the Montcalm Potato Company a formal notice of the arrival of the cars and that the same were held for charges

and for orders as to disposition. The Kontolin Potato Company had no business address in Chicago and the notice to it was not received, but was returned to the Pennsylvania Company through the post office. After further fruitless efforts on the part of Coyne Brothers to locate said cars, they ascertained on June 24th that the cars were on the tracks of the Pennsylvania Company, and they then directed said company to place the cars on its team track. The cars arrived on the team track of the Pennsylvania Company on June 25th, where the potatoes were inspected and found to be more or less sprouted and withered. The invoice price of the potatoes in Michigan was 75 cents a bushel and the freight charges to Chicago were 8 cents a bushel. The fair cash market value on June 17th to 19th in Chicago of good marketable potatoes, such as the potatoes in question were when they were received by plaintiff in error for shipment, was $1.08 to $1.10 per bushel. The fair cash market value on June 28th of the potatoes in the condition in which they were found in Chicago on that day was 85 cents per bushel. The amount of the verdict and judgment approximates the difference between the value of the potatoes at 85 cents per bushel and $1.08 per bushel.

The shipping orders and bills of lading issued thereon contain the following:

"It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns."

One of the conditions which appear on the back of said shipping orders and bills of lading is as follows:

"Sec. 2*****The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property, (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of

lading unless a lower value has been represented, in writing, by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events the lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence," etc.

It is insisted by plaintiff in error that its liability for any loss to the potatoes is controlled and limited by the terms of the shipping contract and must be determined upon the basis of computation provided therein, namely, the price paid by defendants in error for the potatoes at the point of shipment plus freight paid and deducting therefrom the value of the potatoes at the time and in the condition when same were delivered at destination; that as the price paid for the potatoes at point of shipment was 70 cents per bushel and the freight rate was 5 cents per bushel, the value for which plaintiff in error became liable was 65 cents per bushel; and that as the value of the potatoes at the time and in the condition of their delivery at destination was 30 cents per bushel, no damages accrued to defendants in error under the terms of the contract of shipment.

This insistence of plaintiff in error is in this case predicated on a false premise. The cars were never delivered by it at the destination to which they were consigned for shipment, i. e., the tracks of the C. & N. W. Ry. Co. in Chicago. Plaintiff in error expressly agreed to deliver the cars at said destination, and the evidence fails to disclose any justification for its failure so to do.

It appears to be settled law that where a carrier unjustifiably deviates from the agreed route or mode or manner of transportation, it becomes liable as an insurer for any loss or injury to the shipment, and cannot avail itself of any exceptions made in its behalf in the contract of shipment. This rule has been held to apply to a provision in a contract of shipment that claim for loss or damage to the property

shall be limited to its cash value at the place and time of shipment. A well considered case bearing upon this question is McKeham v. American Ex. Co., 109 Mass., 370, reported in 35 L. R. A., (N. S.), 1046, where will also be found an exhaustive note citing numerous authorities in support of the rule, as above stated. See also Dunseth v. Yale, 3 Ill., 286, and The S. D. Scovey Co. v. The Union Transit Co., 108 Wis., 394.

It is urged, however, that the voluntary acceptance by defendants in error of the cars in question at the Pennsylvania Company's team track constituted a waiver by them of their right to the delivery contracted for, and estops them from setting up a misdelivery by plaintiff in error. The damage to the potatoes by reason of the failure of plaintiff in error to deliver the same at the agreed destination had already accrued when defendants in error requested the Pennsylvania Company to place the cars on its team track, and whether, under the facts and circumstances disclosed by the evidence and the inferences reasonably deducible therefrom, the acceptance by defendants in error of the potatoes on the team track of the Pennsylvania Company operated as a waiver by them of a compliance by plaintiff in error with its contract to deliver the cars at the tracks of the C. & N. W. Ry. Co. was a question of fact for the jury, and we are not persuaded that their finding upon that issue was unwarranted.

The views above expressed render it unnecessary to consider and determine the other questions discussed by counsel.

The verdict and judgment stand for substantial justice, under the law, and the judgment is affirmed.

JUDGMENT AFFIRMED.

325 - 18263.

FRED N. BAYLISS,
Plaintiff in Error,
vs.
E. M. BENT,
Defendant in Error.

185 I.A. 437
ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

Judgment in bar was rendered against Fred N. Bayliss in favor of E. M. Bent, defendant in error, in a trial by the court in an action of the fourth class for the breach of a written contract entered into by them December 10, 1908, for the erection of a dwelling house for plaintiff in error for $9,438. The breaches alleged were the failure of defendant in error to install a boiler and piping and an extension tank of sufficient size and capacity, and sufficient of radiation to make good his guaranty in said contract to install a hot water heating plant in the building that would heat the house to 70 degrees in zero weather.

The contract provided that the dwelling was to be erected according to certain plans, drawings and specifications made by the architect as agent of the owner, plaintiff in error, and under the architect's direction and supervision; that no payment was to be made on the contract except on his certificate that he considered it properly due, but that it shall not except the contractor, defendant in error, from liability to make good any work so certified, if it was afterwards found to be not done according to plans and specifications, or if defective work had been done, or improper materials had been used; that the architect should interpret the drawings and specifications, decide on the quality of the work and materials furnished, and his decision be final and binding on those points; that on forty-eight hours written notice he could remove or cause to

be removed all unsatisfactory work or material and have the same corrected at the contractor's expense; that he shall certify for all additions or deductions which may result from changes of designs or plans; that on final settlement each party may present any bills or make any statements to the architect before he makes his certificate or adjustment between the parties, and his opinion, certificates, report and decision on all matters are to be binding and conclusive; that the right is reserved to the owner by conferring with the architect to modify or alter the plans and specifications in any way without invalidating the contract, and an extra charge or deduction as shall appear just shall be made; and that subcontractors are not to be recognized under the contract, and the contractor is to be strictly held under the contract to execute it and use such materials as are described in it.

The guaranty is in these words: "The contractor must guarantee to heat the house at 70 degrees in zero weather".

The contract also provided:

"In connection with this guarantee it is distinctly understood and agreed that the contractor shall be entirely responsible as the Archt. assumes no responsibility for the proper heating of the building, as the lay-outs, etc., furnished by the Architect are merely in his opinion sufficient. If in the opinion of the contractor, additional material or larger sized equipment are required to fulfill the guarantee, he must so state in his proposal."

By the terms of the contract the boiler was to be of the make of the American Radiator Company, or equal, "of the proper size", to be complete with all necessary equipments; the radiation "to be of 2, 3 and 4 columns, ornamental cast iron radiators of proper heights, of American Radiator make, or any other their equal in the opinion of the architect", and the expansion tank, "to be galvanized and of proper size and located where shown, same to be complete with water guage, vent pipe to atmosphere, and overflow pipe to laundry tubs."

It clearly appears from the foregoing provisions that it was not intended by said contract to confer authority upon the architect to pass finally upon the question as to whether or not defendant in error had fulfilled his guaranty as to the heating plant. The architect by express words in the contract assumes no responsibility for the proper heating of the building as the layouts furnished by him are merely in his opinion sufficient. The amount of radiation required is not specified by him. The responsibility for furnishing materials of sufficient size and capacity to produce the guaranteed heat of 70 degrees in zero weather is expressly and solely the contractor's. Only the character of the materials and of the workmanship were specified in the heating contract. The materials were to be new and first class in every respect, and were to be delivered in perfect and undamaged condition. The work was to be executed in a thoroughly substantial manner. The character of the work and materials were to be, and were, passed on by the architect, and no objections were found thereto. The architect was not to be the final arbiter as to the capacity of the plant, and he expressly testified that he never did pass on its sufficiency, and had no opinion as to whether or not it had when completed sufficient capacity to heat the building to 70 degrees temperature in zero weather.

The architect's certificate in a building contract is not conclusive as to the amount due nor a bar to the owner showing a violation of the material parts of the contract by which he is damaged, unless there is a positive provision to that effect in plain language. Mercantile T. Co. v. Hensey, 205 U. S., 298; Adlard v. Muldoon, 45 Ill., 193; Salfisberg & Co. v. City of St. Charles, 154 Ill. App., 531.

The contractor will be responsible for any substantial defect that has escaped the architect's attention, although a final certificate is given, where such a contract provides that

the certificate shall not exempt the contractor from making good any work certified, if not done according to the contract. Snell v. Evans & Son, 55 Ill. App., 670; Mich. Ave. M. E. Church v. Hearson, 41 Ill. App., 89.

The evidence for plaintiff in error shows that the house was completed and that he moved into it about June, 1909; that the final certificate and the final payment were made in September, 1909, and that he found after thoroughly testing the plant that he could not heat the house properly; that in a three hours test, after firing and pressing it to the limit with the weather at about 15 or 20 degrees above zero, the highest temperature obtained was 64 degrees in the living room, 42 degrees in the girl's room in the attic, 50 degrees in the north east bed room, 60 degrees in the dining room, and that no place in the house showed a temperature higher than 64 degrees; that defendant in error was notified of the test and was present and on request refused to do anything further to make good his guaranty; and that plaintiff in error then employed another heating man to remedy the plant, who added to it 500 feet of radiation, and a larger boiler and an expansion tank at reasonable and customary charges, to the amount of $485, and in addition thereto took the original boiler furnished as a part of his charges.

As the judgment will have to be reversed and the cause remanded for reasons hereafter given, we do not desire to comment on the merits of the evidence further than to say, that, as testified to by the architect, we think that a practical test in cold weather should have considerable weight in determining the heating capacity of the plant.

The court refused to hold as propositions of law that the question of the performance of the said guaranty was not a question submitted to the architect by the contract, and that he was without authority to determine that question by

his certificate or otherwise. In those rulings the court erred, and the judgment in this case is, therefore, based on an erroneous view of the law. There are no findings by the court on the ultimate facts disclosed in the record, and no judgment should be entered here as those facts are contested. The amount of the actual damages recoverable, if any, are not disclosed by the record, as the reasonable and customary cost of the additional materials do not furnish the proper measure of damages. The highest estimate given by any witness of the amount of additional radiation required to secure by the plant the guaranteed heat was 300 feet. It does not very clearly appear from the evidence that a larger boiler and expansion tank were necessary to make good the guaranty. The reasonable cash value of the additional work and materials necessarily required, if any, to make good the guaranty is all that plaintiff in error could legally recover in this case. The simple proof, however, that the plant was not of the capacity guaranteed would be sufficient to entitle plaintiff in error to a judgment for nominal damages, although it did not disclose the amount of the damages actually sustained. To sustain a judgment for more than nominal damages the record must contain the proper evidence upon which to base such a judgment.

It is insisted that there can be no recovery in this case by plaintiff in error, because he asked defendant in error to place seats over the radiators in the living room and in the hall, as the evidence shows that these changes reduced the heating capacity of the plant at least 25 per cent, and that plaintiff in error was so informed when the request was made. The contract expressly gave to the owner the right to make the changes in question without invalidating his contract on conferring with the architect, and they were made and paid for as extras on the certificate of the architect. The change having been made by the defendant in error without asking a

modification of his guaranty would furnish no cause of complaint in the absence of such provisions allowing changes, and certainly would not under this contract expressly permitting the same. Dugleby Bros. v. Lewis Roofing Co., 139 Iowa, 412.

On making the contract in question it was the duty of defendant in error to add to the heating plant whatever of work and materials, if any, were required to make good his guaranty, and it was his right to receive pay for such additional work and materials on the certificate of the architect. His failure to add the additional work and materials required would subject him to nominal damages, at least, even if the plant should be shown by the evidence to have been sufficient if the seats had been omitted. We agree that nominal damages should be recovered, however, unless the evidence should show that the plant was insufficient to meet the guaranty with the seats omitted, as both parties are entitled to their full rights under the contract.

There is no force in the contention that plaintiff in error waived his right to insist on the guaranty in question by his accepting or receiving the written guaranty of the subcontractor made to defendant in error that the plant should heat the house to 70 degrees in cold weather, or because defendant in error refused to so guarantee the plant after the house was finished, if he did so refuse. There was no contract to substitute the subcontractor's guaranty for the contractor's and there was no consideration for such a contract. Defendant in error had already made the written guaranty in question, and he could not be relieved from it by refusing to make another, or by simply delivering the paper in question to defendant in error.

No errors are assigned on the rulings of the court in the admission or in the rejection of evidence offered and hence no such rulings are before this court for decision.

The judgment of the court is reversed and the cause remanded.

REVERSED AND REMANDED.

335 - 18274.

185 I.A. 439

STELLA F. RHODES, Appellant,	APPEAL FROM
vs.	SUPERIOR COURT,
ILLINOIS COMMERCIAL MEN'S ASSOCIATION, a corporation, Appellee.	COOK COUNTY.

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

One Edwin R. Cahoone received on June 12, 1909, a policy of insurance from Illinois Commercial Men's Association, a mutual accident insurance company, doing business on the assessment plan under the statute in force July 1, 1896. Chap. 73, Hurd's R. S., 1911, p. 1366. Stella F. Rhodes, appellant and mother of said Cahoone, was designated as the beneficiary to whom, if living, the policy provided that in case of the accidental death of said member there should be paid the sum of $5,000, in accordance with, and subject to, all of the provisions of the by-laws of said association and of all amendments, alterations and new issues thereof. The policy further provided that all of said by-laws and all amendments and alterations thereof as soon as made should become a part of the policy as fully as if they were recited at length over the signature of the assured, and that the said assured, Edwin R. Cahoone, agreed to abide and be bound thereby by the acceptance of the policy.

Appellant declared on the policy *in haec verba* and alleged that on August 26, 1909, at Newark, New Jersey, said Cahoone suffered bodily injury from external and accidental means, and as a result of said accident died April 4, 1910; that on the day he died she gave satisfactory notice and proof of the death of said Cahoone, and that all the terms of the policy had been complied with, etc.

Appellee pleaded the general issue and eighteen

special pleas, the seventh and sixteenth of which pleas set forth in bar of said suit, that at the time said Cahoone became a member of the said association and at all times since there was in full force and effect and binding upon him and appellant, a certain by-law of said association in these words, to-wit:

"Article VII, Sec. 2. Whenever any member of this association in good standing shall, through external, violent and accidental means, receive bodily injuries which shall, within ninety days from and after the date of said accident, and independently of all other causes, result in the death of said member, and only in such case, the beneficiary named in the application of said member,*****shall be paid***** (except as provided in Sections 8, 9 and 10, Article VII of these by-laws) within ninety days after the receipt by the association of proof, satisfactory to the Board of Directors, of said injuries and of the accidental cause thereof, the sum of five thousand dollars, less any and all sums previously paid to said member as indemnity on account of said accident, in full satisfaction of any and all claims on account of said member; provided, however, such member shall be totally disabled as a result of such injury, and such total disability shall be continuous from the time of the injury to the time of death of said member. But no death claim will be paid by this association unless, within fifteen days after the happening of such accident, said member, or in case of his death or inability, then some person on behalf of or his beneficiary, shall have sent to the secretary of this association written notice of said accident, and unless the death of said member occurs within ninety days after the date of said accident, and unless said claim for death benefit be presented to the association within thirty days after the death of the deceased member, together with full proof of the death and of the particulars of the accident claimed to have caused said death."

The seventh plea then concludes by averring that the death of said Cahoone did not occur within ninety days after the date of the alleged accident. The sixteenth plea closes with the allegation that no notice of the happening of the alleged accident was sent to said association within fifteen days after the happening thereof. A special replication was filed to the sixteenth plea averring, in substance, that appellee was notified of said accident December 6, 1909; that thereafter and while said Cahoone was confined to his bed by reason of said accident, appellee caused physicians to call on and examine him numerous times preceding his death, and

thereby induced him and appellant to rightly believe that appellee had waived the provisions of said by-law requiring said notice. General demurrers were interposed to the said replication and the seventh plea. The court overruled the demurrer to the plea and sustained the demurrer to the replication, and appellant having elected to stand by her demurrer and her replication, the court entered judgment that she take nothing by her suit, etc.

The lower court by sustaining a general demurrer to appellee's seventh plea, and in entering judgment in bar of appellant's suit, in effect held that the by-law in question, providing, in substance, that there could be no recovery in case the said Cahoone did not die by reason of the accident within ninety days thereafter, was legal and binding on appellant in this case.

Appellant insists that the lower court erred in this holding, and contends that the by-law in question is in direct violation of Section 244 of said act, 9 GV-63 because that section requires that the policy or certificate shall state on its face the contingency upon which the insurance shall be paid, the amount which shall be paid, and the number of days after proof that amount shall be paid. That section provides thus:

"Every policy or certificate issued by any corporation doing business under this act and promising payment to be made upon a contingency of death or physical disability, shall specify the sum of money which it promises to pay under such contingency, and the number of days after satisfactory proof of the happening thereof on which such payment shall be made. Upon the occurrence of such contingency, unless the contract shall have been avoided by fraud or by breach of its conditions, the corporation shall be obligated to the beneficiary for such payment at the time and to the amount specified in the policy or certificate."

It is clear from the reading of that section and other sections of the said act that it was not intended to require all the contingencies upon which the sum mentioned was to be paid, should be stated in the policy or that the by-laws

should not provide for certain other contingencies upon the happening of which no part of said sum should be paid. It simply requires the corporation to specify the amount of its liability, and the time the same shall become due, in case the contract is not avoided by fraud or breach of its conditions.

Section 332 of said act provides that corporations organized under it may by their board of directors, trustees or managers make by-laws not inconsistent with the constitution and laws of this State or of the United States, which shall define the qualifications and privileges of the members thereof. Section 334 thereof provides that said officers shall, subject to the provisions of the act, fix the rates, amount of premiums, assessments or periodical calls, and the time and manner of payment thereof, and the risks to be assumed by such corporations and the duration thereof, and may change the same from time to time as the experience of the corporation may require. By the express provisions of the certificate or policy accepted by Edwin R. Cahoone, the insured, the contract of insurance consists of three parts, the certificate, the application for membership, and the by-laws of the association. The by-laws are, therefore, a binding part of the contract, unless contrary to the laws of the State or of the nation, or are inconsistent with the terms of the certificate. Ill. Com. Men's Ass'n v. Parks, 179 Fed., 794; Snow v. Royal League, 223 Ill., 32; Fullenwider v. Royal League, 180 Ill., 621.

The by-law in question was in force at the time the policy was issued according to said plea, and we see no reason for holding that a party to such an insurance contract can not bind himself and his beneficiary by an agreement that there shall be no liability on the contract, if death does not result in ninety days after the accident. No court could reasonably hold that it would be unreasonable for such a policy to provide that death should occur within one year

after the happening of the accident or there would be no liability against the insurer. It would simply be equivalent to a provision that it should be deemed conclusively presumed that death was not the result of an accident unless it occurred within one year after the accident. Such a provision, therefore, would not be inconsistent with the terms of the policy itself.

For the same reason we do not think the limitation in the by-law in question is unreasonable or inconsistent with the terms of the policy and should be upheld as it is not in contravention of any statute or law of this State. Clarke v. Ill. Com. Men's Ass'n, 180 Ill. App., 300.

Section 209, Chapter 73, Hurd's Statutes, 1909, p. 1316, 8 ta 8 6-28 providing that policies insuring against loss of life resulting from accident shall state on their face the agreement with the assured has no application to accident insurance on the assessment plan. To hold that said section 244 provides that the whole contract or all the contingencies of recovery must be written in the face of the certificate would be virtually to hold that no by-law could by agreement be made a part of the contract under the statutes in question, and to nullify other provisions of the act.

The court rightly held the seventh plea of appellee good, and as such a holding is decisive of the case, it will not be necessary to discuss the validity of the sixteenth plea or the said replication thereto.

The judgment of the court is affirmed.

JUDGMENT AFFIRMED.

391 - 18436.

NELSON T. BURROUGHS, Appellee,	APPEAL FROM
vs.	MUNICIPAL COURT
WILLIAM J. SELLECK, Appellant.	OF CHICAGO.

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

The court excluded all of appellant's evidence, directed a verdict and gave judgment for appellee, Nelson T. Burroughs, in the sum of $5,363.66 in an action for the balance due on a written contract. The contract was entered into August 19, 1910, and recites that the Faulk Realty Company as agent for appellee had received of appellant, William J. Selleck, $5,000 to be applied on the purchase price of property belonging to appellee located in Gloucester County, Virginia, about 1,025 acres, known as Warner Hall, with the improvements and all personal property thereon, except certain articles named on a list thereto attached; that appellant agrees to purchase the property for $70,000 cash, and pay the taxes of 1910, and the cost of the conveyance and for the examination of the title, and to make full settlement in sixty days or forfeit the deposit; and that the deposit is to be refunded, unless a good title is given, and all other tax liens and indebtedness on the property "other than the trust thereon to be paid to the date of the transfer". The terms of the contract were expressly assented to by appellee and appellant and their signatures and seals affixed thereto.

Appellant filed his counter claim setting forth, in substance, that in order to induce him to enter into said contract appellee caused the said realty company prior to the sale to issue a prospectus of "Warner Hall", in which, among

other things, it was stated that, "the 80 acre orchard thereon is one of the most valuable assets of the place; about 6,000 trees are in full bearing, consisting principally of the best varieties of apples, pears, peaches and plums"; that one Mr. Phipps as agent of appellee in said sale vouched to appellant that that statement was true and expressly stated that said orchard contained 6,000 trees; that appellant confidently believed and relied upon the truth thereof, and, therefore, signed said contract and paid said $5,000 in money; that appellee expressly authorized and directed said prospectus and representations, well knowing that they were false and that the orchard did not contain that number of trees, and that he caused the representations to be so made for the purpose of obtaining more purchase money for the property than it was worth; that said orchard only contained 3,790 trees and that the 2,210 other trees, if they had been in the orchard, would have been worth on the land $15,075; that appellant would not have purchased said property at said price had he had any doubt of the truth of said representations; that he did not learn of their falsity until after he had made said payments, and was not at or on the land after the sale, before said payment and a further payment of $60,000 were made by him on said contract; that, therefore, appellee is indebted to him in the sum of $15,000, and in a like sum for property bargained and sold and not delivered, and for money had and received by appellee to appellant's use, to appellant's damage of $30,000.

Appellee replied and admitted that said realty company and Mr. Phipps represented him in said sale. Denied that he ever authorized either of them to make said representations. Alleged that appellant and his manager were on the said lands prior to the sale thereof, and examined the

same, and had as full knowledge thereof as appellee. Avers that on October 15, 1910, a further agreement was signed by the parties hereto, in substance, that $5,000 of the purchase money should be withheld by appellant for his protection, until a dispute between them in regard to certain personal property should be amicably adjusted by them; that that dispute was amicably adjusted and in about December, 1910, appellant through his attorney expressed himself that every thing was satisfactory, and that he would pay said balance shortly, and that appellant has no just claim against appellee.

Appellant after admitting the claim of appellee introduced evidence and offered other evidence tending to prove every material averment in his statement of counter claim. The proof so offered tended to prove that appellee had made to appellant misrepresentations as to a material fact for the purpose of deceiving and defrauding appellant, and that appellant relied on the representations under such circumstances as would induce a reasonably prudent man so to do, and that he was damaged thereby. Had this suit been an independent action at law by appellant against appellee for fraud and deceit, the evidence, without a return, or an offer to return the property to appellee, would have been sufficient, in the absence of rebutting testimony, to have warranted the jury in returning a verdict for damages against appellee. Antle & Bro. v. Sexton, 137 Ill., 410; Allin v. Millizen, 72 Ill., 301; Drew v. Beall, 80 Ill., 164.

It is argued by appellee that the contract being under seal it can not be rescinded or abrogated in any action at law for false and fraudulent representations by appellee as to the quantity or quality of the property sold, and such is the law. Only fraud in the execution of a sealed instrument, i. e., such fraud or trickery as has induced the execu-

tion of a sealed instrument of a character not intended to be executed, may be pleaded and proved for the purpose of abrogating it and entirely defeating an action thereon without first resorting to a court of equity to have it declared void. Parks v. Harmond Co., 192 Ill., 631.

In the absence of a statutory provision permitting such defenses, want of consideration and total failure of consideration or other such defenses can not be shown in an action at law for the purpose of suing a suit on a sealed instrument, and our negotiable instrument act only makes such defenses applicable to negotiable instruments. Kimbett v. Hurlbut, 115 Ill., 403; Chicago Wash P. & R. Mfg. Co. v. Haven, 195 Ill., 474.

The contract in question here is a sealed instrument and within the rule as above stated. Jackson v. Security L. Ins. Co., 233 Ill., 181.

Where, however, the defense offered is in the nature of a counter claim and is offered simply in mitigation of the damages, and not for the purpose of impairing the legal effect of the deed or instrument under seal sued on, the foregoing rule of law is not necessarily violated. Parol evidence is admissible to contradict the acknowledgment in a deed of the payment of the consideration, provided it is not sought thereby to impair the legal effect of the deed, but it is inadmissible in any action at law for the purpose of making void the instrument, and for that purpose the consideration can in no way be inquired into or impeached. I. C. Ins. Co. v. Wolf, 37 Ill., 355.

An action for fraud and deceit or a counter claim therefor does not amount to a rescision of the contract, but is in legal effect an affirmance of it, recognizing all of the vendee's legal rights pertaining thereto. The real question in this case is, can appellant legally recoup his

counter claim, and thereby mitigate or lessen appellee's damages to their actual limit in a legal sense when both parties have pursued their legal remedies only? It is the settled law of this state that a claim originating in contract may by recoupment, in order to prevent circuity of action, be set up against one founded in tort, if the counter claim arises out of the same subject matter, and is susceptible of adjustment in one action. So, also, may claims in contract or in tort be set up by recoupment against one founded in contract, if the counter claims arise out of the contract sued on, although the counter claims are for unliquidated damages. Brisben v. Bowley, 17 Ill., 38; Babcock v. Trine, 18 Ill., 420; Stow v. Yarwood, 14 Ill., 424; Lunn v. Gage, 37 Ill., 80; Bonuchmann v. Knoshel, 27 Ill., 175; Bates v. Courtwright, 38 Ill., 518; Streeter v. Streeter, 43 Ill., 155; Murray v. Carlin, 67 Ill., 296; Cooke v. Preble, 80 Ill., 381; Baker v. Fawcett, 69 Ill. App., 300.

An examination of the foregoing authorities shows that the Supreme Court strongly supports and favors recoupment rather than to drive a party to a separate action to obtain his full legal rights under the contract. The defense is allowed in actions on non-negotiable sealed instruments, as well as on simple contracts. The defense of fraud and deceit may not be permissible to every conceivable kind of sealed instruments by way of recoupment, but it is permissible in this state under the very character of contracts now before us. It is expressly decided in Whitney v. Allaire, 4 Denio (N. Y.), 554, and in the same case on the first appeal, 1 Comstock (N. Y.), 305, that one who by fraudulent representations is induced to become a lessee of an entire lot of which the lessor only owned a part, may after the discovery of the fraud enter into possession of the premises and occupy them during

the term and bring an independent action at law for the fraud and deceit, or wait until he is sued at law on the lease for rent and recoup his damages for the fraud in that suit. The same was decided in the case of Morrin v. Lidney, 32 Ne., 350. In an action of covenant on a sealed instrument recoupment for damages for fraudulent representations as to the property therein mentioned, was sustained, and the doctrine of the New York and Maine courts, as laid down in the above cases was expressly approved and sustained in Peck v. Brewer, 48 Ill., 54. The doctrine was again announced by our Supreme Court and was also declared to be a rule of equity, and the New York and Maine cases were again quoted and approved, in the following cases: White v. Cutherlanm, 64 Ill., 181; Allen v. Henn, 107 Ill., 486. See also Kingley v. Miller, 67 Ill., 344; and 3 Am. & Eng. Ency. of L., (1st Ed.) 219.

Unliquidated damages are such as rest in opinion only, and must be ascertained by a jury. They cannot be ascertained by mere computation or calculation as may liquidated damages. Butts v. Collins, 13 Wendell (N. Y.), 139.

Appellant's claim is for unliquidated damages, and set-off in its strict sense can not be maintained, but he may recoup his damages, if any, as is above shown. Set-off may be allowed for liquidated damages arising ex contractu even to the extent of permitting a judgment for the defendant for the excess of his claim over that of the plaintiff. In recoupment the claim recouped is merely allowed by way of lessening the plaintiff's damages, and, while it may go to the extent of extinguishing the plaintiff's damages altogether, yet, no judgment for any excess of the counterclaim over that of plaintiff's claim can be given for the defendant. Appellant should be allowed to recoup in this case to the extent of appellee's entire claim, if the proof be sufficient, as such action

would not be in effect holding the contract invalid, although it may happen to defeat appellee in securing any judgment at all by reason of former payments on the contract.

In the decision of this case, we are not to be understood as expressing any opinion whatever upon the merits of appellant's claim. We simply hold that his evidence tended to prove every element of fraud and deceit, and that he was entitled to have a jury pass on the merits of his defense. The only point upon which his proof was lacking was as to the amount of damages, if any, he was entitled to recover. The correct measure of damages in this case is the difference between the actual value of the land, as conveyed to him, and the same land with 5,000 fruit trees there as represented, and the proof should be so directed, and not as to the value of 2,010 fruit trees of like kind situated or growing on the land. Antle & Bro. v. Saxton, 137 Ill., 410. The court, however, ruled that all of appellant's evidence was incompetent for the reasons aforesaid, and no other specific objection was made on the trial questioning the character of proof as to the amount of the damages, and in this ruling the court was in error. The court did not err, however, in permitting appellee to amend his statement of claim.

It is suggested by appellee's counsel that the evidence discloses that appellant got a great bargain in the property actually conveyed to him. That may be very true, but the law is that he was entitled to the full benefit of his contract without damage by fraudulent misrepresentations, if he was so defrauded.

It is also suggested that he had good opportunity to know the exact extent of the orchard, and that he did know it, and that he was not deceived, and did not rely on the representations, and if so did not act as a reasonably prudent man. Our only answer must be that those questions are

questions of fact, and appellant was entitled to the verdict of the jury thereon under proper instructions. The judgment is, therefore, reversed and the cause remanded.

REVERSED AND REMANDED.

403-13449.

185 I.A. 448

ARCHIBALD W. McCANDLESS, Appellee, vs. JOHN N. CROUSE, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

The Superior Court decreed that appellant, Dr. John N. Crouse, pay to appellee the sum of $1,327.75 for the neglect of his legal duty to keep in repair the house and barn of appellee while the legal title thereto was held by appellant pending former litigations between the parties to this proceeding. The history and results of the former litigation between the parties hereto may be fully understood by reading the opinions in the cases of Crouse v. McCandless, 121 Ill. App., 237, McCandless v. Crouse, 220 Ill., 344, and MacFarland v. Utz, 175 Ill. App., 525.

The Appellate Court in the first case above cited adjudged that appellant, Dr. Crouse, should pay to appellee, Dr. McCandless, the sum of $2,189.31, and that appellant should reconvey to appellee the land in question, and that the note of appellee of $4,650 be delivered by appellant to appellee and cancelled, and reversed the decree of the Superior Court, and remanded the cause for proceedings in harmony with the judgment of the Appellate Court. The Appellate Court further found in said cause "that under the circumstances appellant having had the management and control of the real estate is not entitled to be reimbursed for any excess of expenditures over receipts, if any such there was, nor should he be compelled to account for any excess of receipts, if there was any". On appeal by Dr. McCandless the Supreme Court affirmed the judgment of the Appellate Court, and in concluding the opinion

of the court Judge Wilkin said:

"These views are in harmony with the decision of the Appellate Court, and are based upon the presumption that the condition and value of the real estate to be reconveyed have not been deteriorated by any act of the appellee or through any neglect of legal duty on his part. Should the contrary be shown the court below can adjust the equities between the parties in that regard."

Afterwards, March 9, 1907, said cause was re-docketed in the Superior Court. December 3, 1907, appellant filed a petition in said original cause reciting the filing of the bill and the answer thereto, the date of the decree of the Superior Court, and the substance of the findings aforesaid of the Appellate and the Supreme Courts on the appeals. Averred that he tendered to appellee, Dr. McCandless, said sum of $2,189.31, and a deed to said real estate and the said note, as ordered by the Appellate Court; that appellee accepted said sum of money, but refused to accept said deed or note; that there is no record of pleading or statement in this cause showing in detail the claim of appellee as to any alleged damage to said real estate; and that said real estate has not been deteriorated by any act of petitioner or by neglect of any legal duty on his part. Prayed that appellee answer his petition and set out in detail and by items in what respect he claims said real estate has been deteriorated by act or neglect of petitioner's legal duty thereto.

In answer to said petition and an order of court appellee admitted the receipt of the $2,189.31, and averred that there was a frame residence on said premises in good and perfect repair renting at $35 per month when he deeded them to appellant, and that there was also a barn on the rear of said premises in a good state of repair; that it was the duty of appellant while retaining the title thereto to maintain the buildings in reasonable repair and in tenantable condition; that he failed to do so to such an extent that the buildings

were of no substantial value at the time he tendered to appellee a deed thereto; that by reason of appellant's negligence the cement floor and the plastering in the basement and in the laundry of the house were destroyed; that new laundry tubs, new pipes to the furnace, a new floor in the laundry, new side walks, new screens, new plaster in the hall, and paper in front and rear halls, stairways and parlor, and in dining rooms, were required; that the house required a new porch floor, new lightning rods, new roof, new trim in dining room, new shades, kitchen sink, wash bowls, and new gutters; that the house needed painting and papering and the floors, the windows and doors should be repaired and other parts should be repaired and calcimined; that the barn is dilapidated and decayed and required a new roof, new windows and a new second floor, plastering, etc., and that it will cost $3,500 to put the reasonable repairs on the house and barn. A general denial or replication was filed to the answer.

The issues thus formed were referred to the Master in Chancery for proofs and his findings thereon. The master after hearing the evidence found and held that the said note and the deed to said premises to appellee were tendered by appellant August 1, 1906; that appellant received said residence in a good and perfect state of repair, and the barn in a good state of repair at the time the same were deeded to him by appellee, and that the house was renting at $55 per month; that while he retained title thereto it was the duty of appellant to maintain the improvements in a reasonable state of repair and in tenantable condition which he failed to do, and by reason of his negligence the residence and barn were tendered back in very bad condition, very much neglected and in a poor state of repair, and specified thirty-five particulars in which the barn and residence were so neglected and nearly

destroyed, as alleged in appellee's said answer, and to the damage of appellee in said sum of $1,327.75; that the chimney, floor and joists of the barn and the fence were in a bad condition and needed repairs, and the barn needed painting, all of which repairs would amount to a further sum of $138, but that he makes no allowance for the same because appellee's said answer does not specify said items; that on December 7, 1907, a decree of foreclosure was entered against appellee and appellant and others for the total sum of $5,801.76 on the notes and trust deed subject to which they were deeded to appellant by appellee about April 1, 1906, and that the premises on sale under said decree sold for the debt and costs of foreclosure leaving no deficiency; that at the request of the parties the said master on August 7, 1908, viewed the premises to determine the exact conditions there, and that he found the premises in a dilapidated condition apparently abandoned and allowed to go to ruin and doubtless in worse condition than they were in 1906; that the shingles upon the roof of the house were in great part blown off or rotted away, and that the water had found its way through the roof without hindrance and had run down the walls into the ground and apparently into the basement, disturbing the foundations of the house; and that the barn was in such a condition that it is hardly worth reclaiming, and that its roof and floor were practically rotted away and that the walls form but a shell and a remnant of a building; and that appellant urged before him that he was not liable for the expenses of putting the said premises in a tenantable condition, because he claimed the evidence showed that he received in income and profits from the premises a less sum than he expended thereon, which he held to be erroneous, etc.

Appellant urged fifty-six objections to the master's report, thereby objecting to every finding and holding made by

the master, including the specific amount of damages found for acts of negligence by appellant in failing to maintain the premises in reasonable repair and tenantable condition, as disclosed in March and in August, 1926, all of which objections the said master overruled. The court thereafter overruled the exceptions of appellant to the master's rulings and entered said decree.

Appellant has employed very much of his brief and argument in an apparent attempt to convince this court that the Appellate Court in its decision on the first appeal made a strange error in calculation by which he was deprived of $3,397 which that court held to be due him. That court found that the evidence clearly showed that the land deeded to appellant was worth from $1,000 to $3,000 over the encumbrances on it. Had the Appellate Court decided to let appellant retain the land at the lowest valuation, $1,000, the actual value of the bonus paid to him, including the note, would have been $5,650. A settlement on that basis would have required appellant to return seven-tenths of the value of the land in money, or $700, and to have accepted credit for $1,872.83, due on appellee's note, and that settlement would have shown him in debt to appellee $530, more than the Appellate Court found appellant should pay. Had the real estate been estimated to be of no value whatever above the encumbrance, as now contended by appellant, the actual value of the bonus would have been the value of the note, and a settlement upon such valuations would still show appellant indebted to appellee in the sum of $2,039.31. There is no reasonable basis for appellant's conclusion that he has been deprived of the sum of money above mentioned or of any other sum by miscalculation. If there were any grounds for that conclusion, they could not avail appellant on this appeal for the reason that the said judgments of the Appellate and Supreme Courts above referred to are res adjudicata, and

binding on the parties to this appeal. Therefore, appellant's further claim that no matter what the condition of the improvements on the premises were at the time appellant tendered back a deed therefor, appellee can not recover damages for their dilapidated condition, because appellant paid out more on the property than he realized out of the profits or rents from it, is untenable. The Appellate Court in the first case above cited decreed that appellant was not entitled to reimbursement for any excess of his expenditures over the receipts from the property, if any, and that he could not be compelled to account for any excess of his receipts over expenditures, if any. That is the end in legal contemplation of any further contention by either party to this suit in regard to a recovery for such receipts or expenditures, and appellant's expenditures on the property prior to the tender of his deed or prior to said judgment of the Supreme Court have no significance in this proceeding, except in so far as it may tend to refute appellee's charge that appellant neglected his duty to keep in repair said improvements. The evidence in this record in that particular merely proves that appellant's books show that he made the expenditures therein named; but no witness, not even appellant, testified that repairs to the amount of those expenditures or in any other sum were ever actually made on the buildings by appellant.

Appellant has received full credit for the real estate deeded by him to appellee at the nominal price he paid appellee for it, and has received also his full legal rights in the rents of appellee as a further credit. It would therefore be wholly inequitable for appellee to be compelled to receive back the real estate at its named value in the original contract, if its value was materially impaired by any neglect of the legal duty of appellant prior to his return or offer to return

it to appellee, and the Supreme Court so decided. In view of the judgment of the Supreme Court and its decision above cited, which were based solely upon the idea that each party should do equity and receive equity in return, we think the Superior Court did not err in sustaining the holding of the master in chancery, that it was the legal duty of appellant to tender the property in question to appellee in reasonable repair and in tenantable condition, or pay to him a sum sufficient to put the premises in such condition. And it must be admitted and is virtually admitted by appellant that the evidence in this case shows that he did not tender the property in such condition, and that by reason thereof appellee is damaged.

We think also that the evidence supports the finding by the master in chancery and by the court as to the amount of appellee's damages. The finding is amply supported by the testimony of appellee's witnesses, McInnis and Cormack, two experienced builders and contractors who visited the buildings and made their estimates in March, 1908. The former testified that to make the needed repairs to the house and barn it would require the expenditure at reasonable prices of the sum of $1,442, $1,059 for the house, $358 for the barn and $15 for carting away the debris. The latter testified that it would require for that purpose a total of $1,289, $348 of which he estimated for repairing the barn, $10 for removing debris, and the remainder for the dwelling. John Jeffrey, a contractor, testified for appellee that the total expenses for such repairs would amount to $1,209, $751 for the dwelling, $443 for the barn and $15 for removing the debris.

Four witnesses for appellant testified that they made their estimates as to conditions in 1908 and that the dwelling could be placed in proper repair at a cost of some less than $500. George H. Young testified for appellant that he re-

paired the house in 1909, and left it in very fair condition,- in tenantable condition, at a cost of about $400. He also testified that he did nothing to the cement floor or to the ceiling in the basement which the evidence showed had been practically destroyed by exposure and neglect, and there were other parts of the building shown to be out of repair that he did not repair. It further appeared from the evidence that after he repaired the house it was rented for only $45 per month for the term, April 1, 1909, to April 30, 1911.

The decree of the court is affirmed.

AFFIRMED.

66 - 18509.

185 I.A. 450

J. W. NETTERSTROM, Defendant in Error,	ERROR TO
vs.	MUNICIPAL COURT
KINZIE MANUFACTURING COMPANY, Plaintiff in Error.	OF CHICAGO.

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

In a trial before the court in an action of the fourth class on a contract for services and commission judgment was rendered for defendant in error against plaintiff in error, Kinzie Manufacturing Company, for $325.

The substance of the testimony of defendant in error is that he had been an architect for twenty years, and in 1910 he was employed by plaintiff in error, engaged in interior finishing work, to see prospective parties desiring such work, make drawings if necessary, and estimate the cost of putting the work in place; that he was to receive as his compensation therefor 5 per cent. on the contract price of all jobs estimated by him and secured by plaintiff in error on such estimates; that the Derby Desk Company was the designer for the Long-Critchfield job to be done on the building at 5th avenue and Jackson streets, Chicago, and that he gave the desk company finished specifications and estimates for the job, amounting to $10,000 and telephoned his estimates to plaintiff in error; that then Mr. Knox of the Derby Desk Company had him go down again and make a second estimate on the job with certain changes and omissions in the former plan, and that he did so, his second estimate and bid for the job being $6,500, which he submitted to plaintiff in error which accepted his work and bid and in turn submitted them to the Derby Desk Company and secured the job at said latter sum.

Mr. Knox corroborated defendant in error in every particular concerning his efforts at estimating and assisting plaintiff in error in securing said job. He also testified that there was a change made as to the finishing of the wood work before plaintiff in error signed the contract; that it would amount to very little, and that the contract was signed for $6,500, with practically the same terms submitted by defendant in error; and that there was a change in the floor plan after the contract was signed.

Mr. Stoeckle for plaintiff in error testified that he was its president and that defendant in error submitted to plaintiff in error two estimates on the Long-Critchfield job at $10,000 and $6,500, but that he refused to sign up the contract for the latter sum with the desk company, because it was too low; that he called up defendant in error and told him it was too low and that he would not take the job at that price, and to go back and refigure the job; that defendant in error afterwards called him up and told him the Derby Desk Company would not let him have the blue prints; that a lot of work was afterwards eliminated and that then he accepted the job at $6,500 on other estimates, but not on any estimates made by defendant in error.

Mr. Gifford, an employee of the Derby Desk Company, corroborated Mr. Stoeckle as to his testimony concerning the Long-Critchfield job, except that he testified that defendant in error made no other estimate than the one for $10,000.

Mr. Stoeckle also testified, and so did his daughter, that at the time plaintiff in error took the job of work in question, defendant in error was working under a later contract by which he was only to receive 1½ per cent. commission on jobs of work secured under his estimates and bids, and $25 a week for superintending the work. Defendant in error admitted the making of a second contract as stated, but testi-

fied that by a third arrangement the terms of the first contract were revived and that the job in question was secured under their third contract and not under the second. Mr. Stoeckle testified there was no such third contract, and also that he had discharged defendant in error just after he made his second estimate on the Long-Critchfield job, and that he did not ask defendant in error to superintend the work on that job for that reason.

The only question on this record submitted for our decision by plaintiff in error is as to the facts in the case, it contending that the finding of the court is against the "vast preponderance" of the evidence. We have referred to all the witnesses and have given the substance of all their evidence material to the issues. It is our duty to affirm the judgment, unless it is clearly and manifestly against the weight of the evidence. Haug v. Haug, 193 Ill., 645; Miller v. Bendlemen, 97 Ill. App., 115.

We discover no error in the finding and judgment of the court, and the judgment is affirmed.

JUDGMENT AFFIRMED.

189 - 18581.

185 I.A. 451

JOHN TRZETIATOWSKI, an infant, by Michael Trzetiatowski, his next friend, Defendant in Error, vs. EVENING AMERICAN PUBLISHING CO., Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

This is a writ of error to reverse a judgment of $750 in favor of defendant in error against plaintiff in error, Evening American Publishing Company, for personal injuries received by the former, March 23, 1911.

Defendant in error alleged in his statement of claim that while he was on Webster avenue near its intersection with Robey street, Chicago, using due care for his safety, an automobile truck of plaintiff in error negligently driven by it at the speed of twenty-five miles an hour, and without signal or warning, then and there struck, bruised and wounded him in his face and body and severely injured and disfigured him.

The evidence tended to show that Robey street is east of Seeley avenue and that they run north and south and cross Webster avenue at right angles; that at the time in question defendant in error, between ten and eleven years of age, was crossing Webster avenue from north to south with a roller skate on one foot; and that as he was nearing the south side of that street within about a half lot of Seeley avenue he was struck on his left side by the automobile truck, and knocked down and dragged and injured by it as it came from Robey street.

There is a conflict in the evidence as to whether defendant in error was walking or skating as he was crossing the street, as to whether or not he used diligence in looking out for danger, and also as to whether his injuries were serious and substantial, or only slight and trifling.

Plaintiff in error's evidence tended to show that defendant in error was only slightly injured, and that the automobile was going slowly just before it hit him, not exceeding three to five miles per hour, and that defendant in error dashed suddenly in front of it without looking for danger. One witness stated that defendant in error had seen the truck just before he was struck, and was trying to cross ahead of it before it could pass him.

Defendant in error testified that he looked towards Sasley avenue, and straight south ahead of him, but did not look towards Robey street, as he was crossing the street, and that he did not see or hear the automobile until it struck him. His witnesses testified that the automobile was running very rapidly, and struck and dragged him for twenty or thirty feet, and that he was considerably injured.

On the evidence introduced we think the case ought to have been submitted to the jury, and that their finding as to the facts whether or not defendant in error was injured by plaintiff in error's negligence and whether or not the boy was at and before his injury in the exercise of reasonable care, should be final and conclusive, if properly instructed. The evidence further tended to show that the automobile was driving westward on the south or left side of the street in violation of the well known law of the road, "Drive to the right". A party crossing the street naturally and reasonably expects that his danger from automobiles and other vehicles will only arise from parties driving in conformity with the law of the road or of the street.

The case will have to be reversed and remanded, however, for the reason that the court instructed the jury that if they found the defendant guilty, it was proper to take into consideration as elements of his damages, "any pain and suffering or disfigurement of body", due to said "accident". As the amount of damages was closely contested and very slight according to the evidence of plaintiff in error, the instructions concerning the same should have been accurate. We regard it as the settled law of this state that injury to personal appearance is not a proper element of damages to be considered by the jury in personal injury cases. Souleyret v. O'Gara Coal Co., 161 Ill. App., 60; Weinberg v. City of Chicago, 172 Ill. App., 77; Cullen v. Higgins, 216 Ill., 78; Welch v. Sullivan, 235 Ill., 81.

Complaint is made, also, that the court allowed some of the witnesses to testify that the automobile "ran fast", "ran very fast" and "ran mighty fast", because such expressions are vague and meaningless. Some of the testimony of that character was left without further explanation, and is, therefore, of little value in estimating the speed of the automobile, but we do not feel warranted in holding such evidence as absolutely incompetent, and particularly where evidence for plaintiff in error was offered to the effect simply that the automobile was "running slow". There was evidence tending to show that the machine was running at a speed sufficient to drag the boy from twenty to thirty feet, and one witness testified that it was running so fast "anybody could never see it - it was all dust on the street". This evidence coupled with the fact that the automobile was driven on the left side of the street entitled defendant in error to have the question of plaintiff in error's negligence considered by the jury.

For the error indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

287 - 19684.

185 I.A. 452

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

CHARLIE LEE,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

Charlie Lee was on July 15, 1913, found guilty by the Municipal Court "in manner and form as charged in the information", and sentenced to confinement at labor in the House of Correction of the City of Chicago for the term of six months.

The information was duly sworn to by William F. Bowler, a police officer of said city, by the clerk of the court, and charges, in substance, that Charlie Lee on July 10, 1913, at said city, unlawfully, knowingly and willfully encouraged, aided, caused and abetted and connived at, the delinquency of one Nellie Furlong, a female minor child under the age of eighteen years, to-wit: seventeen years, and did then and there knowingly, willfully and unlawfully do acts which directly produced, promoted and contributed to conditions which rendered said Nellie Furlong a delinquent child, and that the said Charlie Lee took the said Nellie Furlong to his room and lived there with her as man and wife, contrary to the form of the statute, etc.

The information contains the endorsement of Joseph Z. Uhler, Judge of said court, that he examined the same and the informant, and was satisfied there was probable cause for filing the same, and that leave was thereby granted to file it. Before trial plaintiff in error filed in the form a waiver of a jury trial and pleaded not guilty.

It is urged by plaintiff in error that the "amended information" is insufficient and defective in form and in substance, because it does not charge an offense in the full language of the statute. The statute in question is Section 43 hh, Chapter 38 of Hurd's Revised Statutes, 1911, p. 761, and the words of the statute indicated as omitted are, "as defined by the statutes of this state", and, "as so defined". It is argued that by reason of said omissions, and because it is not definitely stated in the information in what particular the female child was or had been delinquent, it could not be understood by the court and plaintiff in error with what he was charged. The statute clearly and fully defines what is a delinquent child, and declares that "any female child who while under the age of eighteen years, violates any law of this state; or is incorrigible, or knowingly associates with thieves, vicious or immoral persons****; or is guilty of indecent or lascivious conduct; ****shall be deemed a delinquent child." Section 168, Chap. 23, Hurd's Stat., 1911, p. 314.

Plaintiff in error is presumed to know the law and what constitutes a delinquent female child within the meaning and definition of the Statute. It was not necessary to state the statutory definition of a delinquent female child, nor to designate in the information in what particular the female child in question was delinquent. By Section 8, Division 11, of the Criminal Code it is provided that every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct which states the offense in the terms and language of the statutes creating the offense, or so plainly that the nature of the offense may be easily understood by the jury. It has been frequently decided by the Supreme Court that where the offense is purely statutory, having no relation to

the common law, where the statute specifically sets out what acts shall constitute the offense, it is sufficient if the indictment charges the offense in the words of the statute, and especially when the offense is a misdemeanor. The indictment in such cases is sufficient in every instance, if the defendant is thereby apprised with reasonable certainty of the nature of the charge. Loehr v. People, 132 Ill., 504; Maxwell v. People, 158 Ill., 248. The same rule, of course, is equally applicable to informations.

Where, however, the language of a statute creating a new offense does not describe the act or acts of the defendant that shall constitute the offense, the pleader is bound to set forth the facts specifically. This rule is clearly stated in Cochran v. People, 175 Ill., 28.

The statute in question does not specify the act or acts that are to be deemed as directly producing, promoting or contributing to conditions which render such minor female children delinquent, or as aiding, abetting or encouraging such delinquency. It was necessary, therefore, to state in the information the act or acts of the plaintiff in error that did produce or tend to produce such results, i. e., to state the acts of plaintiff in error that constituted the offense charged. The information meets this requirement by adding the allegation that plaintiff in error "took the said Nellie Furlong to his room and lived there with her as man and wife, contrary to the form of the statute", etc. We think the information is sufficient after verdict in the absence of a motion to quash it. The proof also clearly showed that the child in question had been a delinquent, that she had had a bastard child by another Chinaman and that she and the plaintiff in error were not married, and when arrested were living together as man and wife at his room and bedding and sleeping

together, and had been for several days, contrary to the wishes and protests of her parents, and that her parents were unable to control her or prevent her lascivious conduct.

It is further urged that the judgment and sentence is void because there was no plea or jury waiver made or filed by plaintiff in error "on the amended declaration", or complaint, and because the court did not "announce a proper finding of dependency and of guilt, and passed no lawful judgment and sentence". The judgment of the court and its finding as above set forth are in proper form as shown by the record. The announcement of the court or the judge's minutes are no part of the judgment proper, and can not be so considered. They merely serve as indicators for the correct recording of the judgment and sentence in the record by the clerk.

The record in this case shows that the court gave permission to the state on motion to amend the complaint in the matter of the date, if it should appear to be material after the testimony was heard. The record no where recites that the information was so amended, and it can not be presumed that it was from a showing that leave to amend was granted.

The information as it appears in the record contains the averment that plaintiff in error committed the offense July 10, 1913. It was sworn to on that date before the clerk, and the affidavit and jurat appended so show. There is no indication on the face of the information or complaint that it was amended by erasing any former date, and the record does not recite that it was amended in that manner or otherwise. It is not vitiated by the statement on the side margin thereof signed by the clerk, "William F. Bowler reSworn July 15, 1913". When an information is presented by a party other than the State's attorney, it must under the Municipal Court Act be

sworn to by him, and his affidavit in due form should be appended thereto and subscribed by him, and the jurat of the officer in due form should also be appended and signed by him in his official capacity. If amended in court, it must be re-verified by the prosecuting witness and a new affidavit and jurat in due form should be appended and subscribed by the prosecuting witness and the officer in the same manner as aforesaid, so that the court may see that a proper affidavit was made before an officer having power to administer the oath. Section 27, Municipal Court Act; People v. Zlotnicki, 246 Ill., 185.

It is incumbent on plaintiff in error in this court to show affirmatively by the record that the error complained of was committed by the trial court. There are no reversible errors shown in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

March Term, [illegible]

18 - 18821.

185 I.A. 454

ALBERT B. YUDELSON, Plaintiff in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT
PHILIP WINTERBERG, Defendant in Error.	)	OF CHICAGO.

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

This was a suit of the fourth class in the Municipal Court, brought to recover $71.50 claimed by the plaintiff to be due him for services as a physician. The defendant interposed a set-off amounting to $85, and claimed, further, that part of the services rendered by the plaintiff were rendered before he had a license to practice medicine. On a trial before the court without a jury, the court found in favor of the defendant upon both items of defense, and rendered judgment for the plaintiff for $7. The plaintiff sued out this writ of error to reverse that judgment.

A motion to dismiss the writ of error was made upon the ground that the writ of error was not sued out within thirty days, as required by section 23 of the Municipal Court Act. That motion was reserved to the hearing. Since that time the Supreme Court, in Hoffman v. Paradis, 259 Ill. 111, and Goldstein v. Muller, 259 Ill. 237, has decided that the section relied upon is unconstitutional. The motion to dismiss is therefore denied.

It is claimed that the finding is contrary to the evidence. We have examined the abstract and the record with some care, and are unable to say that the finding is manifestly contrary to the preponderance of the evidence.

It is finally urged that the court erred in refusing to permit the plaintiff to take a non-suit. Section 30 of the Municipal Court act provides: "Every person desirous of suffering a non-suit on trial shall be barred therefrom unless he do so before the jury retire from the bar, or before the court, in case the trial is by the court without a jury, states its finding." While it is true that the request for a non-suit in this case was interposed before the court made the formal announcement that "the finding of the court will be for seven dollars for the plaintiff", yet it was not made before the court had stated in substance what his finding would be. The motion for a non-suit came too late, in our opinion.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

October Term, [illegible]
437 - 18,607.

185 I.A. 455

W. A. FRASER COMPANY, Appellee,	)	APPEAL FROM
vs.	)	MUNICIPAL COURT
THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Appellant.	)	OF CHICAGO.

MR. PRESIDING JUSTICE PITCH

DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment against defendant for $22,087.07 in the Municipal Court in an action of the first class, for loss of grain shipped by the plaintiff over the railroad of the defendant, at various times between 1902 and 1910. Plaintiff was in the grain business, and operated a grain elevator in each of nine towns in Illinois along the line of defendant's railroad. At each of these towns, plaintiff bought grain from the farmers, which, after being weighed by the plaintiff, was placed in the plaintiff's elevator. When the plaintiff desired to make a shipment, it notified the defendant's local agent, who thereupon caused the required number of cars to be switched to the plaintiff's side track. The plaintiff loaded the grain from its elevator into these cars, and defendant then issued a bill of lading to the plaintiff for each car-load of grain, or in a few instances, for several car-loads. The defendant had no car-scales at any of the points where such shipments were made, and therefore inserted in each of such bills of lading, the full capacity of the car in pounds as the assumed weight of the grain therein, with the notation: "Weight subject to correction". When the grain was delivered at its destination, it was again weighed by the plaintiff, or its agent. About 5300 cars of grain were thus delivered to and transported by the defendant for the plaintiff during the eight years mentioned, and the plaintiff's

claim is for the value of grain alleged to have been lost in transit, as shown by the difference between the weights of the grain as loaded into defendant's cars and as delivered from such cars at their destination.

It was admitted by the defendant that the weight of the grain, as delivered, is correctly stated in the plaintiff's itemized statement of claim as amended; and it was also admitted that the defendant did not weigh the grain when it received the same for transportation. The plaintiff did not attempt to prove the weight of grain loaded into any particular car, except in a few instances where the shipment consisted of a single car, but introduced evidence tending to prove the total weight of grain placed by it in its elevators during certain periods of time, and that all of such grain was loaded into certain specified cars for shipment. The total quantity of grain thus delivered to the defendant during each of such periods is treated by the plaintiff as a single shipment, and the loss claimed by the plaintiff is the difference between the total weight of the grain delivered to the defendant in each of such shipments and the total weight of grain delivered by the defendant from the cars in which such shipment was carried.

It is insisted by appellant's counsel that this suit, in form and in substance, is a suit for breach of all the written contracts contained in the bills of lading issued by the defendant to the plaintiff; that each bill of lading is a separate, independent contract; and that it was incumbent upon the plaintiff to prove a breach of each of such contracts by showing, if it could, that the defendant failed to deliver the precise quantity of grain which was loaded by the plaintiff into each of the cars. To this contention appellee's counsel reply, in substance, that it was proper for the plaintiff to show the aggregate quantity of all grain of the same kind delivered to the defendant for

transportation during each period, and the total quantity of that kind of grain delivered by the defendant during such period, for the purpose of proving a common breach of all the contracts pertaining thereto and the damage resulting from such breach. In support of this theory, appellee's counsel cite the case of I. C. R.R. Co. v. Cobb, 64 Ill. 148. It appears, however, from a reading of the opinion in that case, that the suit there involved was an action on the case, brought to recover damages from a railroad company for an alleged breach of the defendant's duty as a common carrier. This suit was brought to recover damages for breach of sundry express contracts. The plaintiff's praecipe in this case directs the issuance of a summons against the defendant "in a suit of trespass on the case on promises"; and the plaintiff's statement of claim apparently follows the praecipe. In an action of that character, the plaintiff cannot recover for a breach of any specified promise unless he shows a breach of such promise and damage resulting from such breach. In the Municipal Court, where formal pleadings are not required, the name ~~xx~~ given to the action by the plaintiff is not necessarily decisive of his right to recover. But while this is true, "it is still the law in the Municipal Court, as in other courts, that a party is limited in his evidence, to the claim he has made; that he cannot make one claim in his statement, and recover upon proof of another, without amendment." (Walter Cabinet Co. v. Russell, 250 Ill. 418.) Whether each of the bills of lading constitutes, in and of itself, a separate and independent contract, depends, to some extent at least, upon the circumstances under which such bills of lading were issued. Illinois Match Co. v. C. R. I. & P. Ry. Co., 250 Ill. 396. As we have reached the conclusion that the judgment must be reversed on account of an error in admitting evidence as to the damages al-

leged to have been sustained by the plaintiff, and as the proof adduced upon another trial may throw more light upon the circumstances under which the bills of lading were issued, we refrain from expressing any further opinion upon this point.

The statute provides that at the time any grain is received for transportation by any railroad corporation doing business in this State, "such corporation shall carefully and correctly weigh the same, and issue to the shipper thereof a receipt or bill of lading for such grain, in which shall be stated the true and correct weight"; that "such corporation shall weigh out and deliver to such shipper, his consignee or other person entitled to receive the same, at the place of delivery, the full amount of such grain, without any deduction for leakage, shrinkage or other loss in the quantity of the same"; and that "in default of such delivery, the corporation so failing to deliver the full amount of such grain shall pay to the person entitled thereto the full market value of any such grain not delivered at the time and place when and where the same should have been delivered." (Hurd's Rev. Stat. 1909, Chap. 114, Sec. 118, p. 1758.) Having shown in the manner above stated, that the total weight of the grain delivered from all the cars included in each of such so-called shipments was less than the total weight of grain loaded into such cars by the plaintiff, and having shown further that such grain was delivered at different times and places, plaintiff called a witness who was permitted, over the objection of appellant's counsel, to testify to a computation made by him of the market value of the grain thus shown to have been lost. This computation was made by multiplying the total loss in each of such shipments by the <u>average</u> of the prices obtained for the grain which was delivered upon the several dates when it was so delivered. It appears from the exhibits offered

in evidence that the difference between the highest and lowest of the market prices thus obtained varied in each of such shipments from a cent or two per bushel to as much as thirty-two cents per bushel. In some of such shipments the average price thus taken for purposes of computation exceeds the lowest price obtained for some of the grain in the same shipment, by from ten to twenty-three cents per bushel. For aught this record shows, all of the loss on any such shipment may have been due to a leak in one car of that shipment. If such were the fact, the defendant would only be liable for the value of the grain missing from that shipment at the market price of such grain on the day when the car from which it leaked was delivered to the plaintiff. The value on that day would have been a certain amount. It could not (except by coincidence) have been the average of the market values on other days. Such proof of value was clearly inadmissible, on any theory. By way of answer to this objection appellee's counsel suggest that if a computation had been made at the lowest price at which any of the grain in each of such shipments was sold, the amount of damage thus ascertained would exceed the amount of the verdict, and therefore the error was harmless. The record shows, however, that the amount of the verdict is exactly the amount obtained by computing the value of the grain lost upon the basis of the average prices of grain sold, excluding interest. No claim for interest is made in the plaintiff's statement of claim. Hence, we must assume that the jury took the computation mentioned as the basis for its verdict as to the amount of damages sustained. Furthermore, we find from a somewhat careful examination of a large number of exhibits offered in evidence, that the amount of the verdict exceeds, by several thousand dollars, the amount of damage actually shown to have been sustained, if it be assumed that the defendant

failed to deliver the number of bushels of grain claimed by the plaintiff and the loss in each shipment be computed at the lowest price per bushel at which any car of that shipment was sold. It follows that in any view that may be taken of the evidence and of the liability of the defendant, the verdict as rendered cannot be permitted to stand.

For the error indicated, the judgment of the Municipal Court will be reversed and the cause remanded.

REVERSED AND REMANDED.

513 - 19984.

185 I A. 457

BERNARD JACKARND, Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT
CHICAGO RAILWAYS COMPANY, Appellant.	)	COOK COUNTY.

MR. PRESIDING JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Appellee recovered a judgment in the Circuit Court for $1,000 for damages sustained in a street car accident. The accident happened at the intersection of Division and State streets, in Chicago. South and west from this intersection, appellant operated a double-track street railway, and the tracks curve at this point from one street into the other. In turning the corner, the ends of long cars "overhang" several feet, and the "clearance" between the end of such a car while rounding the inner curve, and a car passing by on the outer curve, varies from six inches to twice or three times that number of inches, according to the position of the cars at the time they pass each other. Appellee was driving a team of horses drawing an empty wagon north and west upon or near the outer curve, and was going at a walk or slow trot. One of the appellant's large "pay-as-you-enter" cars, coming from the west on Division street on the other track at a speed of five or six miles an hour, turned the corner upon the inner curve. In making the turn, the back end of the car swung around and struck the hub of the left front wheel of appellee's wagon, with such force as to throw him and his horses to the ground, thereby causing the injuries complained of.

Appellee testified that he was familiar with the place where the accident occurred; that he had often turned the same corner and "knew that when a car was going around the curve the

back end of it strikes out and toward the other track"; that he had "observed that one of those big cars as it turns at the curves swings some six or seven feet to the other track"; and that he had seen a wagon, drawn by three horses abreast, turn the curve on one track, while a car was passing on the other, without being struck by the end of the car. He also testified that when he came up to the curve from the south he was "tracking"; that he saw the car coming toward him on the other track when it was thirty or forty feet away; that he was then "right on the curve, turning on Division street"; that he tried to turn out of the track to the right; that he "didn't get any part of the wagon turned", but "just had the horses about turned", when the "hind step" of the car hit the front wheel of his wagon. When asked whether it was not the fact that when the collision came the left wheels of his wagon were in the space between the two tracks, he said: "Well, I don't know how it happened - it happened all right." When asked the question: "How faraway from the south-bound track were you at the time - the track the car was running on?" he replied "Well, I just exactly can't tell that. * * * Maybe it was a little out of the track. I don't know."

From the evidence adduced by the defendant, it is clear that although appellee's wagon was going along in the right hand tracks before he entered the curve, and until after the front end of the car had passed him, yet at the time of the collision, both the left wheels of the wagon were within the space between the north-bound tracks and the south-bound tracks. A plat showing the exact location of the tracks and curves and the respective distances was offered in evidence. From this plat, and the uncontradicted testimony of one of the witnesses regarding the "clearance", it appears to be capable of mathematical demonstration that no collision could possibly have

occurred unless either the street car or appellee's wagon left the track it was riding in while rounding the curves. There is no claim that the car left its tracks, nor is the accuracy of the plat questioned. It follows, necessarily, that appellee must have turned his wagon towards the street car just before the collision occurred, a sufficient distance to bring the left front wheel within the path of the approaching car.

After a most careful examination of the evidence, we are unable to find any fact or circumstance in evidence tending to excuse this act of appellee in driving directly in the way of the turning street car, with such knowledge of the situation and of the danger as he admits he possessed. It was incumbent upon him to prove that at and just before the time of the collision, he was in the exercise of ordinary care for his own safety. Conceding that his evidence tends to prove that after finding himself in danger of being struck by the overhanging end of the street car, he endeavored, and did all he reasonably could, to get out of the way, the fact remains, and is clearly shown by the evidence, that if he had exercised any care whatever before that time, he would either have remained in the north-bound tracks, or would have turned away from, instead of towards, the other tracks before he reached a place which he knew was a place of danger. There is some evidence that an express wagon was passing at the time of the accident on the wrong side of the street; but that fact did not prevent him from remaining in the tracks, where he would have been entirely safe. There is no claim that the passing wagon caused him to turn the wrong way. There is also some evidence that no bell was sounded; but he admitted that there was nothing to obstruct his view of the approaching car and that he saw the car before it reached him. Hence, any warning that a sounding bell could have given him would have added nothing to

the knowledge and notice of danger which he already possessed.

For the reasons indicated, the judgment of the Circuit Court will be reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

FINDING OF FACTS TO BE INCORPORATED IN THE JUDGMENT. The court finds from the evidence that at and just before the time of the accident described in the plaintiff's declaration, the plaintiff was not in the exercise of ordinary care for his own safety and that his failure to exercise such care proximately contributed to the injuries complained of.

523 - 18000.

185 I.A. 458

WILLIAM L. O'CONNELL, as Treasurer of Cook County, State of Illinois,	APPEAL FROM
vs.	CIRCUIT COURT
NATIONAL SURETY COMPANY, a corporation, Appellant,	COOK COUNTY.
and THOMAS CONNELLY COMPANY, a corporation, Appellee.	

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

In this case, the County Treasurer having in his hands a fund of $1050, claimed by both the National Surety Company and Thomas Connelly, filed a bill of interpleader against them, and upon the filing of their answers to the bill, and the payment of the fund into court, an order was entered directing the defendants to interplead and dismissing the County Treasurer. The evidence as to the respective claims of the defendants was heard in open court and a decree entered, finding that Connelly is entitled to $900 of the fund and the Surety Company to the remainder. The latter appeals and contends in this court that Connelly (or his successor, the Thomas Connelly Company, which was substituted as appellee in this court by agreement) had no lien of any kind upon the fund in question which can be enforced in a court of equity, that the award of $900 to appellee is unsupported by any evidence, and that the court erred in refusing to permit a witness to correct his evidence after the case had been closed and continued for arguments.

The evidence tends to prove the following facts: On February 11, 1909, one James J. Fallon entered into a contract with the Board of County Commissioners of Cook County for the construction of a sewer at the county poor house at Oak Forest,

and the National Surety Company gave a bond for the faithful performance of the contract by Fallon. At the same time, John A. Connelly, who was in the building material business, and was doing business under the name of Thomas Connelly, executed, under that name, a bond of indemnity to the Surety Company, in which he agreed to "advance necessary money for payrolls on contract covered by aforesaid bond." On February 17, 1909, Fallon and Connelly agreed, with the consent of Mr. Monaghan, the deputy Comptroller of Cook County, that if Connelly should advance to Fallon $1000 "to be used for payroll purposes", Monaghan would "protect" Connelly "when the estimates came through"; and two days later, viz: On February 19, 1909, Connelly advanced and paid to Fallon $1000 and took from him a demand judgment note, which recites upon its face: "This amount to be used for payrolls at Oak Forest". On March 1, 1909, Fallon and one James J. Prendergast entered into a co-partnership, under the name of Prendergast & Fallon, for the purpose of engaging in the business of "general contracting", and each of the partners contributed to the capital of the firm the sum of $900 in cash. The county contract was turned over to the partnership and they began work on the same on March 15, 1909. Prendergast testified that the $900 put in by Fallon "was used on the Oak Forest job" for payrolls and materials. The sewer pipe was furnished by Connelly. In June, 1909, Fallon "left the country and has not been heard from since." Some time after this (the record does not show the exact date) the Surety Company took charge of the work and finished the contract. On December 14, 1909, Connelly filed with the County Comptroller a claim for a lien upon all moneys due and to become due from the County under the Fallon contract, stating that under a contract between Fallon and Connelly there was due to the latter the sum of $3403.08 "for labor and material

furnished on said Cook County Poor House." It is conceded that of the amount mentioned in this claim, $1000 was for money advanced to Fallon by Connelly on February 19, 1909, as above stated. The witness Hoppe, a salesman for Connelly, testified that before Connelly's claim for a lien was filed, he told Mr. St. John, the manager of the National Surety Company, that such was the fact. St. John denies that any such conversation took place at that time. On March 22, 1910, Prendergast, in the name of Fallon assigned all Fallon's rights to any moneys due and to become due from the county upon the Fallon contract, to the National Surety Company. On the day after this assignment was made, a conference was held in the office of Monaghan concerning the Connelly claim for a lien, and the disposition of about $3000 which had become due from the county. Monaghan, St. John and Hoppe were present at this conference. Both Monaghan and Hoppe testified that the matter of the Connelly claim was discussed at that time, including the nature and character of the $1000 item, that St. John asked that the Connelly lien be released as to the money due from the county, so that the Surety Company could go on with the contract, and said that if this was done, the Connelly claim would be paid in full after the payment of the other indebtedness, as he believed there was enough due on the contract to pay all such claims, including Connelly's. St. John denies this. He does not deny, however, that as a result of this conference the Surety Company, by St. John as vice-president, gave Connelly a letter at that time stating that "providing there is sufficient money due or to become due from Cook County to pay all of the present or future obligations against this contract, all claims will be paid in full, yours included," that thereupon Connelly, in writing, withdrew his claim for a lien, and the amount then due from the county was paid to the Surety Company. Two days later, Connelly filed a new notice with the Comptroller, renewing

his claim for a lien for the same amount upon any moneys thereafter to become due under the contract. Between March 25th and May 10th, Connelly received $809.08 on account, and some time between May 10th and May 28th, 1910, he filed a third lien notice, stating that there was then due him $2594. On May 28, 1910, this notice was withdrawn by Connelly, at the request of the Surety Company, in order that it might collect from the county the amount then due on the contract. The Surety Company collected that amount and paid Connelly $1250, leaving a balance of $1344 unpaid on appellee's original claim of $3403.08. In December, 1910, all other claims having been paid, Connelly was paid $394 on account, but the Surety Company then declined to pay or to authorize the County Treasurer to pay the item of $1000, asserting - apparently for the first time - that Connelly had no lien for that amount. Thereupon the County Treasurer filed his bill of interpleader, with the result already stated.

Appellant's counsel take the position that the legal title to the fund in dispute became vested in the Surety Company by the "assignment" made to it by Prendergast, in the name of Fallon, after the latter had disappeared, and that the legal title thus acquired must prevail in this proceeding, unless it appears from the evidence that appellee has established an equitable lien on the fund, superior to the legal right of appellant. Upon this theory, they insist that the evidence shows that appellee has no statutory lien, because its claim is not for labor or materials furnished to Fallon but is for money loaned to him, and has no equitable lien because (it is said) the claim for such a lien rests solely upon an alleged promise of appellant which is either no promise at all, or merely imposes a general liability enforceable, if at all, only by an action at law against appellant. In the view that we take of this case, all except the last of these contentions may be conceded. The real question to be determined

upon this appeal is whether the court erred in finding, from the facts shown, that appellee has a right to at least $900 of the fund in question, which right is of a character which can be enforced in a court of equity, and which in equity is superior to the alleged legal right of the appellant thereto.

We think it is clear, from the evidence, that appellee's manager, St. John, fully understood the nature and character of Connelly's claim for a lien when Connelly was induced to withdraw his claim, for the time being, in order to permit St. John, on behalf of appellant, to collect from the county the amount then due on the contract and use the same in payment of other claims against Fallon for which the Surety Company was liable under its bond to the county. We think it is equally clear that Connelly withdrew his claim at that time solely upon the understanding, assented to by St. John, both verbally and in writing, that if the amount of money which should thereafter become due upon the contract was sufficient to pay all the claims, his claim should be paid in full with the rest, out of such funds. We agree with the statement of appellant's counsel that nothing contained in the letter written by St. John at the time this arrangement was made can be fairly construed as a definite promise on the part of appellant to pay anything to Connelly, or as an agreement on its part to itself assume any independent, personal liability for the payment of the Connelly claim. But as we read the evidence, the statements made by St. John at that time, the letter written by him, the situation of the parties, and the results obtained, are susceptible of no reasonable explanation that is consistent with fair dealing, save that St. John intended that Connelly should understand from what was said, done and written at that time, and should act upon the understanding, that he, Connelly, would be entitled to receive payment of his claim in

full (including the item of $1,000) out of the fund coming from the county, if and when it should be definitely ascertained that such fund was sufficient to pay all claims arising out of the Fallon contract. This being true, we are of the opinion that appellant thereby in effect agreed that as between itself and appellee, the Connelly claim should be paid in full out of any moneys remaining in the fund after the payment of all other claims, and thereby gave to Connelly an equitable lien upon the fund, as against any right or title on the part of appellant to such remainder.

While it is true that in a proceeding of this character the question for determination is, "Who is entitled to the identical property brought into court", and that "it is not the province of the court in such a proceeding to permit a general accounting between the defendants" (Dyas v. Dyas, 231 Ill. 367), yet it is conceded that it is within the province of the court in such a proceeding to investigate and settle equitable as well as legal claims to the fund in dispute, provided such claims are in the nature of equitable liens upon the particular fund in controversy, as distinguished from merely equitable claims by one defendant against the other, which have never, by contract or otherwise, been made a charge or lien upon the specific fund in court. It is to be noted that no objection was made by appellant to the order requiring it to interplead with appellee as to their respective claims to the fund in controversy, but both appellant and appellee answered, setting up their respective claims, and the complainant, the County Treasurer, was thereupon dismissed. In Chandler v. Morey, 195 Ill. 596, it is said: "Where a bill of interpleader has thus been answered, and the defendants thereto consent to interplead, the court may so shape its decree as to do complete equity between the parties. (11 Ency. of Pl. & Pr. p. 475.) In Whitney v. Cowan, 55 Miss. 625, the court said: 'The court may, at the final hearing, having

the fund in its hands or under its control, fasten upon it, either in whole or in part, any equitable lien or trust which one of the parties may have established, though the proprietary legal title and ownership belong to the other'." We are of the opinion that the claim of appellee to the fund in dispute was properly allowed, under the principles announced in these cases.

The claim that the action of the trial court in awarding $900 of the fund to appellee is unsupported by the evidence is, we think, sufficiently answered by the statement we have already made of the facts in evidence. We think the evidence would have justified a finding and decree in appellee's favor for $1000, and hence appellant was not injured by a finding which awards less than that amount.

It appears that after all of the evidence had been heard and the chancellor had intimated what his decision upon the facts would be, the case was continued for arguments, and that when the case came on for the hearing of arguments, appellant's counsel undertook and offered to prove that St. John had testified inadvisedly and without full information when he admitted that there was enough money in the fund to pay appellee's claim in full "if it were a just claim." Counsel offered to prove that after the witness had so testified, he discovered that two claims were still unpaid, one of which was an alleged claim of Prendergast for services as superintendent. The court declined to reopen the case to permit this evidence to be introduced. This was a matter entirely within the discretion of the court, and under the circumstances shown, we are unable to say that the court abused its discretion.

The further contention made in the briefs regarding an error in the name of appellee, was withdrawn at the time of the oral arguments. We have, therefore, not considered the alleged

error in that respect.

The decree of the Circuit Court will be affirmed.

AFFIRMED.

March Term, 1913

28 - 19,007.

R. A. CRANDALL,
Defendant in Error,

vs.

ALBERT L. KIRK,
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

The plaintiff, R. A. Crandall, recovered a judgment against the defendant, Albert L. Kirk, in the Municipal Court, upon a trial before the court without a jury, for $400, as the balance due upon the purchase price of a second-hand automobile sold and delivered by the plaintiff to the defendant, and this writ of error was sued out to reverse that judgment. It appears that prior to May 11, 1912, the plaintiff had agreed to take for his automobile the sum of $400 in cash and a lot in the city of Oshkosh, Wisconsin, which was to be taken subject to a mortgage thereon for $400; that the defendant had furnished the plaintiff with an abstract of title to the lot; that plaintiff's attorney had examined the abstract and had written an opinion, stating a number of objections to the title as shown thereby; that defendant had procured a letter from an abstract company of Oshkosh, purporting to answer the attorney's objections; that the parties then met on May 11, 1912, and plaintiff's attorney waived all but two or three of his objections to the title; that the defendant said he would try to find certain original deeds which might remove these objections; that, as the plaintiff was about to go to New York, a written agreement was then prepared, which states, in substance, that defendant "has this day" agreed to buy the plaintiff's automobile and "in payment therefor agrees" to pay to the plaintiff $400 in cash, and to

deliver within thirty days "a perfect and merchantable title, meeting the approval of John T. Booz, attorney", to the lot in Oshkosh (describing the same), subject to a mortgage for $400, and concludes as follows: "Said Albert L. Kirk, in the event of his failure to deliver an acceptable title to the premises hereinbefore described, within the time specified, is to pay to said F. A. Crandall the further sum of Four Hundred Dollars ($400) in lieu thereof;" that this agreement, unsigned, was left with the plaintiff's agent with the understanding that when the defendant should bring in the cash payment and sign the agreement so prepared, the plaintiff's agent should deliver the automobile to the defendant; that a few days later, the defendant paid $400 to the plaintiff's agent, signed the agreement, and delivered to the agent a deed conveying the Oshkosh lot to the plaintiff and certain other papers, whereupon the automobile was delivered to the defendant and plaintiff's agent recorded the deed so delivered; that the defendant made an effort to find the original deeds a ove mentioned but did not succeed; and about two months later, without making any tender of a reconveyance of the lot in Oshkosh to the defendant, plaintiff brought suit to recover the $400 which the defendant agreed to pay "in lieu thereof", in case he failed "to deliver an acceptable title to the premises."

A motion was made in this court to affirm the judgment upon the face of the record, and this motion was reserved to the hearing. In support of this motion, it is first urged that none of the plaintiff's ex ibits is included in the stenographic report signed by the trial judge. An examination of the stenographic report shows that during the trial the plaintiff produced, and caused witnesses to identify, eight different documents, including the written agreement, the abstract of title, the attorney's opinion, the answer thereto, and certain deeds; that each of

these documents was described in the question put to the witness who identified it; that all these documents were offered and admitted in evidence, and were marked Plaintiff's Exhibits 1 to 8 inclusive, and are made a part hereof;" that they were not, however, inserted in the stenographic report above the judge's signature, but eight documents, marked "Pltff.'s Ex." 1 to 8 inclusive, which correspond in every way to the documents described in the stenographic report are attached thereto after the judge's signature. In Hughes v. Bell, 157 Ill. 658, it is said: "In our opinion, the true test as to whether exhibits are properly a part of the bill of exceptions is not merely whether they precede the certificate and signature of the trial judge, but whether they are so identified by the bill of exceptions as to show conclusively that they are the ones submitted to the trial court." The court in that case, in applying this test, examined the bill of exceptions and the papers attached, found that the exhibits conformed to "the descriptions of and references to them in the body of the bill," and held them to be properly a part of the bill of exceptions. Following the same reasoning, we are of the opinion that the exhibits found in the transcript of record in this case are sufficiently identified as to become a part of the record.

It is next urged, in support of the motion, that no propositions of law were presented to the trial court. No such propositions were necessary in this case, for the reason that the only alleged errors discussed in the brief of counsel for plaintiff in error relate either to pure questions of fact, or to rulings of the court during the trial which are otherwise preserved for review. (Coverdale v. Royal Arcanum, 199 Ill. 649; Union Traction Co. v. City of Chicago, 202 Ill. 576.)

The third ground urged in support of the motion is that the stenographic report does not show that any motion for a new trial, or motion in arrest of judgment, was made. Neither of such motions was necessary in this case. Siegmund v. Strackbein, 140 Ill. App. 454, and cases therein cited. If it be said that the decision in the case last cited is based upon the fact that an exception to the judgment is there shown, it must be borne in mind that by the amendment made in 1911 to section 81 of the Practice Act no formal exception is necessary to be shown where a stenographic report of the trial instead of a bill of exceptions is certified, filed and used as the record in the court of review. Section 13 of the Municipal Court Act contains a similar provision.

It is further urged that the judge's certificate is insufficient in that (1) it is not under seal, and (2) that it does not certify that the report is a "correct stenographic report of the proceedings at the trial," the language being that it is a "correct stenographic report of proceedings in said cause." The statute does not require the judge's signature to be under seal. (Municipal Court Act, Sec. 23, paragraph 6.) The other objection is hypercritical.

Finally, it is urged in support of the motion that the five days notice, required to be given by Section 81 of the Practice Act, was not given. This objection is fully answered against the present contention of defendant's counsel, by the case of The People v. Union Gas Co., 256 Ill. 193, in which a similar motion to dismiss an appeal upon the same ground was overruled. The motion to affirm the judgment will therefore be denied.

Upon the merits, the only question that we deem it necessary to consider is whether the finding and judgment are sustained by the evidence. Over the objection of defendant's counsel,

plaintiff was permitted to tender, upon the trial, a reconveyance of the Oshkosh lot to the defendant, it being admitted by plaintiff's counsel that no such reconveyance, or offer to reconvey, had been made at any time prior to the trial. As above stated, it appears from the evidence that the plaintiff's agent received and recorded a deed conveying the Oshkosh lot from defendant to the plaintiff. By this act the plaintiff, tentatively, at least, accepted that lot in payment of the balance due him under the contract in evidence. If the plaintiff did not intend to be bound by this tentative acceptance, he should have reconveyed, or offered to reconvey, the lot to the defendant, so that the defendant would be in default upon his promise to pay $400 "in lieu thereof." Until that was done, the $400 so promised was not due from defendant to the plaintiff. When, therefore, the plaintiff brought suit without returning, or offering to return, what he had thus received, he could only recover for a breach of the contract to deliver a merchantable title to the premises conveyed. The measure of damages for such a breach would be the difference between the value of the thing delivered and the agreed value, viz: $400. So far as this action is concerned, the rights of the parties must be determined as of the date when the suit was brought. The offer to reconvey came too late, when first made at the time of the trial. There is no evidence in the record as to the value of the title conveyed to the plaintiff. It follows that the finding and judgment for $400 are not sustained by the evidence, and for that reason, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

March Term.

59 - 19,045.

19045

THE CHICAGO JOURNAL COMPANY,
Plaintiff in Error,

vs.

UNION LIFE INSURANCE CO.,
Defendant in Error.

185 I.A. 462

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

The plaintiff in error brought suit against the defendant in error for $60 claimed to be due upon a written contract, signed: "Union Life Ins. Co., By E. C. Spinney, Pt." The contract offered in evidence is in the form of a letter addressed to the plaintiff in error, stating: "You are hereby authorized to make a Half-tone Engraving and print same, including brief biography, in space of one-half page in the complete edition of your forthcoming work, entitled: 'Notable Men of Illinois and Their State,' * * * for which I agree to pay you my check for sixty Dollars ($60.00)." It was agreed between counsel that the article published by the plaintiff under this contract consisted of a half-tone picture of Edmund C. Spinney, under which appears his name and the words, "Pres. Union Life Ins. Co., Chicago," with a brief biography of Spinney and a statement of the various clubs of which he was a member. Upon a trial before the court without a jury, the court found the issues in favor of the defendant, and from the judgment entered thereon plaintiff sued out this writ of error.

The finding and judgment of the court were clearly right. While it appears from the evidence that Spinney was the president and general manager of the insurance company, there is no evidence tending to prove that his position as such president or general manager gave him any authority to contract, in the name of the company and at its expense, for the publication of a picture and

biography of himself in a book containing biographies of "Notable Men". No such authority can be implied merely from the fact that he was such president and manager. Nor can any such authority be inferred from Spinney's evidence that he had charge of the making of advertising contracts for the defendant. There is nothing in the contract, or the article published, to indicate that the purpose or effect of the publication in question was to advertise the business of the defendant. On the contrary, both the contract and the article published clearly show that the publication contracted for was purely a personal advertisement of Spinney.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

7 - 19,413.

18412

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. MARY BOBOLA,
Defendant in Error,

vs.

ANDREW NADAJ,
Plaintiff in Error.

185 I.A. 463

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BRIDLEY DELIVERED THE OPINION OF THE COURT.

On January 17, 1911, the complaint of Mary Bobola, alleging that she was an unmarried woman and was pregnant with child, which by law would be deemed a bastard, and that Andrew Nadaj was the father of the child, was filed in the Municipal Court of Chicago. A warrant was issued and the defendant arrested. After several postponements of the trial, leave was granted to the State's attorney, on June 30, 1911, to file a "supplemental" complaint, which was done, and in this complaint the relatrix alleged that on May 15, 1911, she was delivered of a female child while still an unmarried woman. After several further postponements of the trial the defendant was arraigned and pleaded not guilty, and on November 6, 1911, a trial by jury having been waived, the court heard evidence and entered a finding that the defendant was guilty as charged in the complaint, and that he was the real father of the bastard child of which the relatrix was delivered on May 15, 1911, and thereupon, after overruling a motion for a new trial, the court entered judgment on the finding and further adjudged that the defendant pay the sum of $550 for the support, maintenance and education of the child, as follows: $100 for the first year after the date of the birth of the child, i.e. $75 instanter and $25 on February 15, 1912, and $50 for each and every year thereafter, payable in quarterly installments of $12.50 each, on the 15th day of the months of May, August, November and February in each and every

year thereafter until said $550 be fully paid, and to be paid to the clerk of the court for the use of said relatrix, and that the defendant be required to give a bond instanter in the penal sum of $1100 to secure the payment of said several sums of money as provided by law, and that should the defendant refuse or neglect to give such security that he be committed to the county jail, etc., and, it appearing that the defendant neglects and refuses to give such bond, that the defendant be committed to said jail, etc. It appears that of said sum of $550 the relatrix has received $75 from the defendant. The defendant by this writ of error seeks to reverse the judgment.

The only point here raised by counsel for the defendant is that the finding and judgment are manifestly against the weight of the evidence. We deem it unnecessary to discuss the evidence as disclosed from the bill of exceptions before us. Suffice it to say that after an examination of the same we are of the opinion that the finding and judgment are warranted by the evidence and are not against its manifest weight. The judgment of the Municipal Court is affirmed.

AFFIRMED.

October Term, 1918, A.D.

520 - 10991.

185 I.A. 476

CENTRAL MACHINE COMPANY, a corporation, Appellee,	)	APPEAL FROM
vs.	)	MUNICIPAL COURT
NORTHERN EQUIPMENT COMPANY, a corporation, Appellant.	)	OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $1,369.25, rendered in an action of the first class in the Municipal Court of Chicago upon the verdict of a jury in favor of Central Machine Company, a Pennsylvania corporation, plaintiff, and against Northern Equipment Company, an Illinois corporation, defendant.

In plaintiff's amended statement of claim it was alleged that plaintiff's claim was for merchandise sold and delivered to the American Boiler Economy Company (hereinafter referred to as the Boiler Co.) at its request, and for services and labor performed and for money expended, etc.; that said merchandise was sold and delivered to, and said labor performed and money expended for, said Boiler Co., "which company was succeeded in business by the Northern Equipment Company, as successors"; and that said Northern Equipment Company "assumed and agreed to pay the indebtedness" of the Boiler Co. due and owing to the plaintiff. It was alleged in the affidavit of merits filed on behalf of defendant that defendant "is not the successor in law" of the Boiler Co. so as to make defendant liable to plaintiff, and is not in any way liable to plaintiff on the latter's alleged claim; that defendant never agreed to pay said claim; that the claim is excessive, unjust and unreasonable; that no part of the merchandise mentioned was ever delivered either to the Boiler Co. or the defendant; that the alleged promise or

agreement of defendant, mentioned in plaintiff's claim, to pay the indebtedness of the Boiler Co. due and owing to plaintiff, was without consideration, and ultra vires; and that at the time of said alleged promise or agreement the defendant was not a corporation and defendant did not at any time, after it was incorporated, ratify said alleged promise or agreement. After a protracted trial the jury returned a verdict in favor of plaintiff and assessed plaintiff's damages at the sum of $1569.25, and the court, after overruling defendant's motions for a new trial and in arrest of judgment, entered judgment upon the verdict.

The material facts are, in substance, as follows: The plaintiff corporation was engaged in business at Philadelphia, Pennsylvania. The Boiler Co. was a New Jersey corporation and engaged in the business of manufacturing and selling regulators and governors for boilers, also at Philadelphia. Charles M. Clark was the president of the Boiler Co., R. W. Barrett was the treasurer and E. E. Norman was the secretary, and K. M. Reed was employed as bookkeeper. Clark was the owner of a large majority of the shares of stock of the company. Prior to February 22, 1909, but after it had contracted the said indebtedness with the plaintiff, the Boiler Co. ceased to do business, and its office was moved to Chicago, Illinois, and its business was there subsequently conducted under the name of Northern Equipment Company. On February 13, 1909, a license was issued by the Secretary of State of Illinois to said Charles M. Clark and two other persons, as commissioners, to open books of subscription to the capital stock of the Northern Equipment Company, a proposed Illinois corporation, which was to be formed for the purpose of manufacturing and selling regulators and governors for boilers, and which was to have a capital stock of $20,000, consisting of 2000 shares of

the par value of $10 each, and its principal office in Chicago, Illinois. The commissioners duly reported that the capital stock had been fully subscribed, that Charles M. Clark had subscribed for 1998 shares, E. E. Norman for 1 share and K. M. Reed for 1 share, that the total amount of the stock had been paid in cash, and that at the first meeting of the stockholders, held on February 25, 1909, said Clark, Norman and Reed had been elected directors for one year. On March 6, 1909, the Secretary of State issued the final certificate that said Northern Equipment Company was a legally organized corporation, and said certificate was filed for record in the office of the recorder of deeds of Cook County on April 20, 1909. On February 22, 1909, (after the issuance of the license to incorporate the Northern Equipment Company but before the certificate of final incorporation had been issued) two letters, each signed "Northern Equipment Co., Chas. M. Clark, Pres." and addressed to plaintiff at Philadelphia, were deposited in the mails and subsequently received by plaintiff. Both of these letters bore the following heading: "Northern Equipment Company, <u>with which is consolidated the American Boiler Economy Company.</u> Charles M. Clark, Pres., E. E. Norman, Vice-Pres." In one letter it was stated, <u>inter alia:</u> "Herewith we enclose our formal announcement of the change of the name and the change of location of the main office of this company. With the main office away from Philadelphia, it will be no longer feasible to make our shipments from that point. You will, therefore, ship to us at this address all the regulators and governors you have left, * * we will have to ask you to make the shipments to us as rapidly as possible. * * You will also ship all the patterns for both regulators and governors owned by us that are now in your possession." In the other letter it was stated, <u>inter alia:</u> "Hereafter the manufacture and sale of the Copes Feed Water Regulator and the

Copes Pump Governor will be carried on by the Northern Equipment Co., of Illinois, with which has been consolidated the American Boiler Economy Company, of New Jersey, having offices in Philadelphia, Pa. The main offices of the new company will be located at Old Colony Building, Chicago, Ill. * * We especially wish to announce that all obligations of the American Boiler Economy Co., including guarantees to replace free of cost any worn out or defective parts * * within 5 years from the date of purchase, have been assumed in full by the Northern Equipment Co. The management will be continued unchanged." In reply to these letters the plaintiff, on February 25th, wrote the "Northern Equipment Company", at Chicago, saying that its records as to the number of regulators, etc., on hand did not agree with the number stated in defendant's letter of the 22nd, further saying that it would quickly make shipment of the patterns as requested, and further saying: "In regards to our account, which is quite a large amount, we would like to know when we will receive the same, as we are in great need of funds."

It does not appear that the defendant, immediately after the receipt of plaintiff's letter suggesting payment of "our account" or immediately after March 6th when defendant's charter was issued, advised plaintiff that it did not consider itself liable to plaintiff on said account, or that it thereafter gave plaintiff timely notice to that effect; and the evidence tends to show that plaintiff, relying on defendant's letter of February 22nd, considered that its account against the Boiler Co. had been assumed by the defendant and would be paid by the defendant.

The minute book of the defendant corporation was produced by the defendant on plaintiff's demand and certain portions thereof offered in evidence. From this it appears that after the first meeting of the stockholders above mentioned, but before the charter had been issued by the Secretary of State and recorded, on,

to-wit. February 26, 1909, the first meeting of the directors was held at the offices of the company in the Old Colony Building, Chicago, all of the directors being present; that said Charles M. Clark was elected president, E. E. Norman vice-president and treasurer, and K. N. Reed secretary; that said Clark announced that the Boiler Co. had offered to sell its accounts receivable, regulators and governors for the undertaking of the Northern Equipment Company to assume all the debts and liabilities due and payable by the Boiler Co., except claims of the Central Machine Co.; that on motion this offer was accepted; that the Boiler Co. offered to sell a small stock of fittings and certain office furniture for $550; that on motion this offer was accepted; that the Boiler Co. offered to sell to the Northern Equipment Company "all U. S. Patents held by said company, as well the right to use the name of the American Boiler Economy Company, and to have that name copyrighted, for the sum of $1.00, and the assumption by the Northern Equipment Company of any liability that might arise by reason of claims against the American Boiler Economy Company by the Central Machine Company"; that all of the above propositions having been duly accepted, said Clark was appointed a committee of one to close negotiations with the Boiler Co., and to do all acts necessary for making the transfers and carrying out said resolutions. Charles M. Clark, president of the defendant corporation, was called as a witness for plaintiff, under section 33 of the Municipal Court Act, and testified that the Boiler Co., of which he was also president, ceased doing business about February 15, 1909, that all its assets, including its books, were acquired by the defendant, and were moved to Chicago, and that its charter was lost; that at the time it ceased doing business it was not insolvent; that its business was practically the same as that afterwards carried on in Chicago by defendant;

that the defendant gave its check, signed by himself as president of defendant, to said Boiler Co. for said assets in the sum of $15,200, the proceeds of which he paid over to himself individually; that no written papers were signed at the time of this transfer, - the defendant company took the assets and the Boiler Co. received the check; that at the time he "made a guess" as to the value of said assets and later on found that he had valued them too high and he made a payment of about $3000 back to the defendant; that the defendant got practically everything of the Boiler Co. for $9,500; that all just debts of the Boiler Co. were paid; that "both companies did some of the paying"; that among the assets of the Boiler Co. acquired by the defendant were regulators and governors manufactured by the plaintiff; that the portions of minutes of the first meeting of the board of directors above mentioned were either written by him or at his dictation; and that the U. S. patents, formerly held by the Boiler Co., are now listed in the name of the defendant or in the name of the witness, and are under defendant's control.

It is first contended by counsel for the defendant that the verdict is not supported by the evidence, for the reason that it appears that, at the time when the letters of February 22, 1909, were written and when said first meeting of the directors of defendant was held on February 26, 1909, the defendant was not a fully organized corporation; that the alleged assumption by the defendant of the debts of the Boiler Co., including the liability of the Boiler Co. for the claim of plaintiff, was never formally ratified by the defendant after it became fully organized, and that, therefore, while the Boiler Co. may be liable to plaintiff, the defendant is not so liable. We cannot agree with the contention. We think that under all the facts in evidence the defendant is estopped from taking such a position.

It is also contended that, while there is evidence tending to show that defendant may be liable to plaintiff as successor of the Boiler Co. in its business, the plaintiff, in its statement of claim, did not sufficiently charge such a liability. While the statement of claim might have been more specific, there is an allegation that the defendant was the successor of the Boiler Co., and we think this is sufficient after verdict. (Mueller v. Phelps, 252 Ill. 630, 633.)

It is further contended that while there is, in plaintiff's statement of claim, no allegation of fraud in the transaction as against the defendant, yet the court in its oral charge submitted to the jury the question as to whether said transaction was fraudulent as to the creditors of the Boiler Co., and that this portion of the charge was prejudicial to the defendant. After carefully reviewing the entire charge of the court in connection with the evidence, we cannot say that the defendant was so prejudiced as to warrant a reversal of the judgment. Furthermore, it does not appear that the defendant, at the conclusion of the charge to the jury, specifically objected to the portion complained of, on the ground that there was no allegation of fraud in plaintiff's said statement of claim, so as to give the court an opportunity to correct the charge. (Pecararo v. Halberg, 243 Ill. 95, 97.) Such objections as were made to the charge were made on other grounds, and the particular objection is now here urged for the first time.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

March Term, 1913.

44 - 18020.

VACLAV ZYGARLOWSKI, Plaintiff in Error,	)	185 I.A. 478
vs.	)	ERROR TO
W. JAWORSKI, WALENTY ZWIERZYNSKI and A. SPYCHALA, Defendants in Error.	)	MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE CRIDLEY DELIVERED THE OPINION OF THE COURT.

On August 22, 1912, plaintiff in error commenced an action of the fourth class in the Municipal Court of Chicago against the defendants in error, hereinafter referred to as defendants. As alleged in the statement of claim, plaintiff's claim was "for damages for the conversion of a fund of $500, the property of plaintiff, by the defendants on or about December 4, 1907, which fund was then in the custody and control of said defendants, as officials of the Polish Roman Catholic Union of America, etc., a fraternal beneficiary society, and held in trust by them for plaintiff", etc. After the filing of an amended affidavit of merits by one of said defendants in behalf of all, the cause was tried before the court without a jury, resulting in a finding in favor of the defendants, upon which the court entered judgment that the plaintiff take nothing by his suit and that defendants recover their costs, etc. By this writ of error the plaintiff seeks to reverse the judgment.

From the stenographic report of the proceedings the following facts in substance appear: The Polish Roman Catholic Union of America, etc., was a fraternal beneficiary society, duly licensed to do business in the State of Illinois. On April 7, 1907, one Antoni Zygarlowski, a member of the society, died, leaving him surviving as his only heirs at law the plaintiff and Roman Zygarlowski, the brother of plaintiff. The society subsequently collected and had in its hands the sum of $500,

payable as a death benefit by virtue of the certificate of membership issued to the deceased in his lifetime. The plaintiff claimed this entire fund and his brother claimed one-half thereof. On August 5, 1907, the society filed a bill of interpleader in the Circuit Court of Cook County, offering to bring said sum of $500 into court and to pay the same to such person or persons as the court should direct, and to this bill the plaintiff and his brother filed separate answers, setting up their respective claims. On December 4, 1907, the defendants were respectively the president, secretary and treasurer of the society and they, together with certain other officers and six directors formed the executive council of the society. This executive council transacted the more important business for and on behalf of the society. One of its duties was to "guard the treasury" of the society. The proofs of death of a member of the society in good standing were sent to it and it finally determined whether such proofs should be accepted and whether death benefits should be paid and to whom. On said date, also, a certain attorney at law, then licensed to practice in the courts of this State, was the regular attorney for the society and transacted its legal business, and he, on August 5, 1907, acted as the solicitor for the society in filing said bill of interpleader. On December 4, 1907, the treasurer of the society, W. Spychala, signed a check of the society for $500, payable to the order of said attorney, and delivered the same to him. Prior to this time said attorney had represented to the executive council that he had to produce the said sum in court, and the said executive council had authorized the issuance of a warrant, signed by the said president and secretary of the society, for the disbursement of said sum out of the funds of the society, and had further authorized that said sum <u>be paid to said attorney.</u> The check was cashed

by the attorney, but he did not turn the proceeds into court but converted the money to his own use. No part of the money was ever returned by said attorney to the society or to the defendants or any of them. On March 25, 1908, the Circuit Court ordered and adjudged that the bill of interpleader of the society was properly filed, and that the society forthwith deposit with the clerk of the court the said sum of $500, and that upon making such deposit the society be hence dismissed with its costs and expenses to be taxed at $10. Subsequently, on April 23, 1908, and again on December 1, 1909, on motion of Vaclav Zygarlowski, the Circuit Court entered a rule on the society to show cause why it should not be held in contempt of court for failure to comply with the said order of March 25, 1908. During August, 1909, the society ceased doing business, and in November, 1909, a receiver was appointed by the Superior Court of Cook County, and all money and other property of the society was turned over to the receiver. Subsequently, the interpleader suit was transferred to said Superior Court, and on November 8, 1911, a final decree in that suit was there entered, in which the court found that said sum of $500, less $10 costs, belonged of right to Vaclav Zygarlowski and that the society had failed and neglected to deposit said sum, as directed by said order of March 25, 1908, and the court decreed that said Vaclav Zygarlowski recover of the society the sum of $490 and have execution therefor.

Counsel for plaintiff here contends that the finding and judgment of the trial court were erroneous because, under the facts and circumstances disclosed, the defendants are personally liable to the plaintiff. Counsel states in his printed brief and argument that he does not contend that the defendants "intended to injure the plaintiff or to wrongfully convert his money", and counsel's argument is that the defendants should be held personally liable because they, instead of themselves depositing the money

into court, paid the same over to an irresponsible agent (said attorney) who converted the same to his own use, whereby plaintiff lost the money.

We are of the opinion that the finding and judgment were proper. Plaintiff's claim was for damages for the conversion of the money by the defendants. It does not appear that they converted the money, or that they, or any of them, received any benefit from the money. It does appear that they, as ministerial officers of the society, either paid or caused to be paid the money to said attorney under the express directions of the governing body of the society - the executive council, and we do not think they should be held personally liable for the tort of said attorney, whom the society made its agent to pay said money into court. (10 Cyc. 826, 951).

The judgment of the Municipal Court is affirmed.

AFFIRMED.

91 - 13072.

185 I.A. 479

JOSEPH HUSAK, Plaintiff in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT
MARTIN MAYWALD, Defendant in Error.	)	OF CHICAGO.

MR. JUSTICE BRIDLEY DELIVERED THE OPINION OF THE COURT.

The plaintiff, Joseph Husak, commenced an action of the fourth class in the Municipal Court of Chicago against Martin Maywold, defendant, to recover the sum of $250, claimed to be due plaintiff, as a real estate broker, for commissions for procuring a purchaser for certain real estate owned by defendant and situated in Chicago, Illinois. The case was tried before the court without a jury, resulting in a finding and judgment in favor of the defendant. Plaintiff by this writ of error seeks to reverse the judgment.

The facts are substantially as follows: Plaintiff was engaged in the real estate brokerage business, as Joseph Husak & Co., at No. 668 Milwaukee avenue, Chicago. He was duly licensed as a real estate broker. In May, 1910, the defendant listed his said Chicago property for sale or exchange with the plaintiff. Early in April, 1911, plaintiff showed the property to one John Swatik and introduced Swatik to defendant. Swatik offered to trade a farm, which he claimed to own, in Starke County, Indiana, for defendant's property. After some negotiations Swatik and defendant signed a contract on April 12, 1911. This contract was drafted by plaintiff. By its terms Swatik agreed to convey his Indiana farm to defendant by warranty deed from himself and wife, and the defendant (a bachelor) agreed to convey by warranty deed his Chicago property to Swatik. It was provided in the contract, as a part of the consideration thereof,

that each party should "provide for the use of the other within 15 days from the date hereof proper abstracts of title to the property hereby agreed by them to be conveyed, * * showing good and sufficient title to the same in the grantors"; that time was of the essence of the contract; that each party should pay his own commissions, attorney's fees, and all other costs incident to his part of the negotiation; that Swatik should pay to plaintiff $200, and defendant should pay to plaintiff $250, as brokerage fees, and that "each one is to pay the above commission to Joseph Husak when deal is consummated." It further appears from the evidence that plaintiff, at Swatik's request, sent the abstract of the Indiana property to an abstract company at Knox, Indiana, to be continued; that the same was continued down to April 19, 1911, as shown by the certificate of said abstract company of that date; that on April 24, 1911, plaintiff delivered said abstract, as so continued, to the attorney for defendant for examination; that said attorney found upon such examination that said abstract did not show title to the Indiana property in Swatik but in one Gvoth, and so informed plaintiff and returned said abstract to plaintiff; that on May 1, 1911, Swatik's attorney exhibited to defendant's said attorney an instrument purporting to be the original deed from Gvoth and wife of said Indiana property to "John Svatik and Eva Svatik his wife and the survivor of them as joint tenants and not as tenants in common", dated and acknowledged January 17, 1911, and recorded by the recorder of said Starke County on January 20, 1911; that on May 3, 1911, plaintiff again delivered to defendant's attorney said abstract of title, so certified by said abstract company as of April 19, 1911, in which abstract a page had been inserted, purporting to show the said transfer from Gvoth to Svatik and wife; that defendant's attorney thereupon, after examining said abstract with said inserted page, informed plaintiff that, as no additional

certificate of the abstract company accompanied the abstract, he was unable to tell by whom said page had been inserted, and that he could not take said abstract as a proper or merchantable abstract under said contract of April 12, 1911; and said attorney thereupon returned said abstract to plaintiff. It does not appear that either plaintiff or Swatik at any subsequent time submitted either to defendant or defendant's attorney any further or amended abstract. A few days after said May 2, 1911, John Swatik and wife executed their warranty deed to said defendant for said Indiana property, and tendered the same to the defendant, but it was refused.

It appears from the "statement of facts and law" signed by the trial judge that the court held in substance that plaintiff, under the terms of said contract of April 12, 1911, could not recover any commission of defendant unless a "proper" abstract was furnished defendant "within 15 days", as specified in said contract, that a "proper" abstract had not been furnished within that time, or at any time, and that, therefore, plaintiff was not entitled to recover any commission. Furthermore, it appears from the evidence that plaintiff himself drafted the contract; that it was therein provided that plaintiff should be paid a stipulated sum by defendant, as commissions, "when the deal is consummated", and that for the reasons disclosed by the evidence the "deal" was not consummated. "Where the contract is such that the right of the broker to compensation is made dependent upon the actual consummation of a sale or the payment of the entire purchase money, a fulfilment of those conditions is, of course, a prerequisite to his right to recover compensation". (23 Ency. Law -2nd Ed.- p. 918; Mechem on Agency. Sec. 965: Ballard v. Shea, 121 Ill. App. 135, 139.)

Our conclusion is that, under the facts of this case, the finding and judgment of the trial court were fully warranted by the evidence and the law, and the judgment of the Municipal Court is, accordingly, affirmed.

AFFIRMED.

5 - 19184.

185 I.A. 480

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT OF CHICAGO.
JOHN SCHLEIG, Plaintiff in Error.	)	

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On January 15, 1913, there was filed in the Municipal Court of Chicago the complaint of Helen Kleich, under section 1 of the "Act concerning Bastardy" and section 50a of the Municipal Court Act, in which she alleged that on December 25, 1912, she was delivered of a male child in the City of Chicago, which child by law would be deemed a bastard, that when she was so delivered she was and still is an unmarried woman, and that John Schleig, plaintiff in error, of Chicago, Cook County, Illinois, is the father of said child. Accompanying the complaint was an affidavit signed by her that the matters and things alleged were true in substance and in fact. The jurat was signed by the clerk of the Municipal Court, but the seal of the court was not attached thereto. The complaint did not bear the indorsement of a judge of said court that he had examined the complaint and was satisfied that a warrant should issue, etc.

On the same day an order was entered of record in said court, in which it was set forth that the relatrix, Helen Kleich, had presented her said complaint under oath, that the presiding judge had examined the complaint and under oath the person presenting the same, that he was satisfied that there was probable cause for filing the same, and that the court was fully advised in the premises, and in which the court ordered that leave be given to file the complaint instanter, that a warrant be issued for the arrest of plaintiff in error and that he be held to bail

in the sum of $1100. The warrant was issued and plaintiff in error was arrested and brought into court on the following day.

It appears from the transcript of the record that on January 17, 1913, the plaintiff in error was arraigned and pleaded not guilty to the charge; that he elected to waive a trial by jury and executed a formal waiver in writing thereof; that by agreement in open court the cause was submitted to the court for trial; that the court found, and entered judgment on the finding, that plaintiff in error was the real father of said bastard child, born on December 25, 1912; that the court further adjudged that plaintiff in error pay to the clerk of said court, for the support, maintenance and education of said child the sum of $550, in certain installments at certain fixed times, until said judgment was fully paid, - the sum of $25 to be paid instanter, and that plaintiff in error be required instanter to give bond with sufficient security in the sum of $1100 to secure said payments, and that in default thereof he be committed to the Cook county jail, etc. And it appearing that it was demanded of plaintiff in error that he give such bond and that he neglected and refused so to do, without showing any sufficient cause, the court further ordered that he be placed and kept in said jail until he should comply with said judgment order, or until he should be otherwise discharged by due course of law. It is sought by this writ of error to reverse the judgment.

Two points are urged by counsel for plaintiff in error as reasons for a reversal, (1) the seal of the Municipal Court is not attached to the jurat signed by the clerk of said court accompanying said complaint, and (2) the complaint does not bear the indorsement of a judge of said court to the effect that he examined the complaint and was satisfied that it should be filed, as provided by section 27 of the Municipal Court Act.

We do not think there is any merit in the first contention. The complaint purports on its face to have been sworn to by the relatrix before the clerk of said court. The clerk appears to have signed the jurat. He had power to administer the oath. (Sec. 1, Chap. 101, Hurd's Stat. Ill.) The order of the court entered on January 15, 1913, discloses that the relatrix presented her complaint "under oath". In this State the jurat of a notary public to affidavits made before him in the county of his residence need not be authenticated by his notarial seal. (Schaefer v. Kienzel, 123 Ill. 430; Stout v. Slattery, 12 Ill. 162.) And it is the law, generally, that "an affidavit sworn to before the clerk of the court in which it is to be used need not bear the clerk's seal." (2 Cyc. 33.) In Cox v. Stern, 170 Ill. 442, 446, it is said: "It has been frequently held, both in this State and elsewhere, that affidavits for attachment are not void because the clerk or officer failed to affix his signature to the jurat." Furthermore, the defect, if it be one, is a mere formal defect, one which does not go to the merits of the question of the guilt or innocence of plaintiff in error, and it cannot be taken advantage of for the first time in this court. (People v. Perca, 181 Ill. App. 666, 668.) If the alleged defect had been called to the attention of the court or the attorney representing the People before or at the trial the complaint could have been amended. (People v. Greenberg, 172 Ill. App. 360, 362; Truitt, v. People, 88 Ill. 518; Long v. People, 135 Ill. 435.)

Nor do we think there is any merit in counsel's second contention. While the complaint does not bear any indorsement of a judge of said court, it appears, from the order entered of record on January 15, 1913, that the presiding judge examined the complaint and also examined under oath the relatrix and was satisfied that there was probable cause for filing the complaint. And this is

sufficient in this court where the point is here for the first time raised. (People v. Greenberg, 172 Ill. App. 360, 366; People v. Pearman, 169 Ill. App. 543.)

The judgment of the Municipal Court is accordingly affirmed.

AFFIRMED.

October Term, 1917.
123 - 19507.

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,
vs.
EDWARD MARS,
Plaintiff in Error.

185 I.A. 482

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE CHRIDLEY DELIVERED THE OPINION OF THE COURT.

On March 24, 1913, an information signed and sworn to by Laura Ebel was by leave of court filed in the Municipal Court of Chicago, in which it was alleged that "Edward Mars, late of the said City of Chicago, heretofore, to-wit: on the 24th day of February, A.D. 1913, at the City of Chicago aforesaid, being the father of William Mars and Raymond and Margaret and John Mars, dependent minor children, did neglect to remove the condition which rendered said minor children dependent, though able so to do." The information was filed under and by virtue of Section 4gh b, of Chapter 38, of the Illinois Revised Statutes (Hurd's Stat. 1912, p. 761). A capias was issued and Edward Mars, the defendant, was arrested. He was arraigned and pleaded not guilty. On April 3, 1913, a trial was had before a jury who returned a verdict finding him "guilty in manner and form as charged in the information," and, after the defendant's motions for a new trial and in arrest of judgment had been overruled, the court, having heard the evidence "touching the circumstances and financial ability of the defendant and having duly regarded said circumstances and financial ability," adjudged that the defendant pay to his wife, Mary Mars, for her use, the sum of $10 weekly on Tuesday of each week for the period of one year from date, that defendant be given leave to enter into a recognizance in the sum of $200 payable to the People for the use of said wife, with sureties to be approved by the court and conditioned

according to law in such cases, and that, in case the defendant should enter into such recognizance and the same be approved as aforesaid, the defendant be released from custody or probation for the space of one year from date. The defendant presented such recognizance, conditioned that the defendant should make his personal appearance in court whenever ordered by the court so to do within one year from date and should not make default in said payments on Tuesday of each week during said year, and the court, after approving said recognizance, ordered that he be released from custody on probation for the space of one year from said date. The defendant by this writ of error seeks to reverse the judgment.

The only points here urged by counsel for defendant are, (1) the defendant did not have a jury trial as guaranteed by the Constitution of the State, in that a name appears among the names of the jurors who signed the verdict which does not appear among the names of the jurors impaneled to try the cause, (2) the trial court erred in the manner in which it conducted the trial while defendant's witness McCloskey was on the stand, and (3) that the verdict is not supported by the evidence.

As to the first point, it appears from the transcript of the record, originally filed in this court, that the name of one of the jurors impaneled to try the cause was "W. J. Paterson", while the name of one of the jurors who signed the verdict was "W. J. Peterson". After the written brief of counsel for defendant had been here filed, in which this point was raised and argued, counsel for the People by leave of court filed an additional transcript in which the judge who tried the case certified under his hand and seal that he had examined the record of said court and the original verdict as rendered remaining on file in said court, and that the name of "W. J. Paterson" appeared as one of the jurors who signed said verdict. There is, therefore, no merit in the contention of counsel.

As to the second point it is contended that, while defendant's witness, McCloskey, was being examined by the attorney for defendant, the court so asked certain questions of the witness and so controlled his examination that the defendant was prejudiced, in that the same tended to cast a doubt upon his testimony. While, ordinarily, it is not good practice for a presiding judge to examine witnesses at length, and while he should exercise especial care that nothing be said by him to the prejudice of either party, (Dunn v. People, 172 Ill. 582; People v. Bernstein, 250 Ill. 33, 36) we are of the opinion that in this case, under the circumstances as disclosed from the record, the court did not commit such error as warrants a reversal of the judgment. And we do not think that the court erred in refusing to allow the witness to produce certain receipts for certain moneys which the witness testified he had given the defendant, and, under the circumstances, in directing the witness to leave the stand.

As to the third point we cannot say, after a careful reading of the transcript, that the verdict is not supported by the evidence.

Accordingly the judgment of the Municipal Court is affirmed.

AFFIRMED.

October Term, 1913.

150 - 19539.

185 I.A. 484

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT
JOSEPH BERG, Plaintiff in Error.	)	OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

An information was filed in the Municipal Court of Chicago in which it was alleged that on April 5, 1913, Joseph Berg, defendant, drove a motor vehicle upon a public highway in the City of Chicago, at a speed greater than was reasonable and proper having regard to the traffic and use of the way or so as to endanger the life or limb or injure the property of any person, and that said defendant did propel his automobile upon the streets of Chicago at a speed in excess of 15 miles per hour, in violation of section 10 of the Motor Vehicle law. The defendant was arrested and pleaded not guilty. Subsequently a trial was had before a jury who returned a verdict finding the defendant "guilty in manner and form as charged in the information," and, after defendant's motions for a new trial and in arrest of judgment were overruled, the court entered judgment upon the verdict, and further adjudged that the defendant pay a fine of $75 and costs of suit, and that in default of such payment he be committed to the House of Correction, etc., and, it appearing that this writ of error had been sued out, the trial court admitted the defendant to bail and released him from custody pending the disposition of said writ.

On the trial, John P. Reiland, a police officer in the employ of the City and assigned to duty in the motor cycle squad, testified on behalf of the People, in substance, that about 7:15

o'clock on the evening of April 5, 1913, he arrested the defendant at the corner of Diversey Boulevard and Diversey Court, public streets in said city; that defendant drove a five passenger automobile along and upon said Diversey Boulevard, from Ashland avenue to Southport avenue at the rate of 29 miles per hour, and from Southport avenue to said Diversey Court at the rate of 35 miles per hour; that this was in a residence district in said city; that the automobile was a touring car and not an ambulance; that there was one passenger, a physician, in the automobile besides the defendant, and that at the time there was not much traffic on said Diversey Boulevard.

At the conclusion of the testimony of this witness the People rested their case, whereupon the defendant moved for a directed verdict in his favor which motion was denied by the court.

Section 10 of the Motor Vehicle Act (approved June 10, 1911; in force July 1, 1911) provides, inter alia, that no person shall drive a motor vehicle upon any public highway in this State "at a speed greater than is reasonable and proper having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person," and that if the rate of speed of any motor vehicle operated on any public highway in this State, "where the same passes through the residence portions of any incorporated city, town or village, exceeds fifteen (15) miles an hour," such rate of speed "shall be prima facie evidence that the person operating such motor vehicle * * is running at a rate of speed greater than is reasonable and proper having regard to the traffic and use of the way or so as to endanger the life or limb or injure the property of any person." Section 18 of said Act provides, inter alia, that the person violating the provisions of said section 10 shall, upon conviction, be fined in a sum not exceeding $200.

Under the testimony of the police officer, Reiland, we think that a prima facie case of a violation of said section 10 of said Act was made out by the People. (People v. Lloyd, 178 Ill. App. 66, 70.) And it then devolved upon the defendant to meet and overcome this prima facie case by competent evidence. (People v. Lloyd, supra; People v. Sumwalt, 178 Ill. App. 357, 358; Meadowcroft v. People, 163 Ill. 56, 70).

Two witnesses testified on behalf of defendant, - the defendant himself and Dr. Krolich, the physician, who was in the automobile at the time. Their testimony was to the effect that the rate of speed of the automobile varied from 17 to 21 miles per hour, and was at no time in excess of 21 miles per hour; that the street was clear and no one was on the side streets or was crossing over Diversey Boulevard; that the speed was slackened when the automobile came to the street intersections; that the pavement was dry and in good condition; that the automobile was in good condition and equipped with "nobby tread tires"; that the automobile at the rate of speed it was going could be stopped at any time within from 15 to 20 feet, and that they were going to the Lincoln avenue barns where the doctor had been summoned to give medical attendance to a man whose hand had been injured.

It will be noticed that both these witnesses testified that the automobile was running at a speed greater than at the rate of 15 miles per hour. And it was for the jury to say whether, under all the facts and circumstances in evidence, the defendant was guilty of a violation of the statute in driving the automobile "at a speed greater than was reasonable and proper having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person," (People v. Sumwalt, supra; People v. Lloyd, supra;) and we are not disposed

to disturb the verdict. We do not think the verdict is contrary to the evidence as contended by counsel for the defendant.

The court instructed the jury orally. This was proper practice in the discretion of the court. (Sec. 37 Municipal Court Act; Norton v. Pusey, 237 Ill. 26, 33.) Counsel for defendant contend that a certain portion of that charge was erroneous and on this account the judgment should be reversed. From an examination of the bill of exceptions, we do not find that the attorney for the defendant, at the conclusion of the charge, objected or excepted to the charge or to any specific portion thereof. The question is not therefore properly before us. "An exception to an oral charge on the whole case should point out specifically the portion of the charge objected to. A general exception to the whole charge is not sufficient. 'This is the general rule in all appellate courts, where the practice of oral charges or instructions prevails, and is necessary to prevent inadvertent errors'." (Pecararo v. Halberg, 246 Ill. 95, 97.) No reason occurs to us why this rule is not applicable to a proceeding such as the present one.

It is further contended that the trial court erred in refusing to give to the jury two written instructions as requested by the defendant. Where the court has determined to charge the jury orally it is proper for the court to refuse to give to the jury written instructions. (Norton v. Pusey, 237 Ill. 26, 34; Lepman v. Employers' Liability Assurance Corporation, 170 Ill. App. 379, 382; Kraft v. Jefferson, 150 Ill. App. 110, 114.)

The judgment of the Municipal Court is affirmed.

AFFIRMED.

430 - 1299.

185 I.A. 499

WILLIAM F. JONES, Appellee,	)	APPEAL FROM
vs.	)	SUPERIOR COURT
JOSEPH EDWARD WILLIAMS, Appellant.	)	COOK COUNTY.

STATEMENT OF THE CASE. This is an appeal sued out by the appellant, Joseph Edward Williams, hereinafter referred to as the defendant, to reverse a decree entered by the Superior Court of Cook County, in favor of the appellee, William F. Jones, hereinafter referred to as the complainant. Complainant's bill alleges that on February 7, 1910, he recovered a judgment against the estate of Catherine Jones Matthews in the Probate Court of Cook County for $594.13 and costs, and that the judgment was still in full force and unpaid; that in her lifetime the said Matthews was the owner in fee simple of certain real estate in Cook County, Illinois (here follows in the bill the description of the said real estate); that prior to the rendition of the said judgment, but after the indebtedness on which the judgment was based had accrued, and in the lifetime of the said Catherine Jones Matthews, she made a pretended conveyance of the said real estate to the defendant Joseph Edward Williams, her son, for a pretended consideration of one dollar; that said conveyance was not a real one, but was a sham one, and was made with the intention of defrauding the complainant out of his just demands; that no consideration was paid for said conveyance, and that the said premises are now held by Williams for the purpose of preventing a levy and sale under crator's judgment; that said Williams is a man of no pecuniary responsibility and is possessed of little or no property, other than that so fraudulently conveyed to him by said Catherine Jones Matthews; that

after the death of the said Catherine Jones Matthews, Orville Jones was appointed administrator of her estate and that he is still acting in that capacity; that no property belonging to the said deceased has come to the knowledge or possession of the said administrator, and that there is no property belonging to the said estate from which the said judgment can be realized; that there is now due upon said judgment $594.13 with interest; that the said premises are encumbered by a trust deed dated September 28, 1907, executed by Joseph E. Williams and wife to Archie C. Tisdale; that the said trust deed was given to secure a note for $5,000 due five years after date; that the said trustee has a first and valid lien upon the whole of the said real estate for the whole amount of said indebtedness. The bill prays that the conveyance from Catherine Jones Matthews to Joseph E. Williams as to the complainant may be set aside, vacated and declared null and void; that an injunction issue, etc.; that a receiver be appointed, etc.; that complainant may be authorized to proceed by writ of fieri facias issued by this court, or by proper proceedings in said Probate Court, as may be deemed necessary. Answers were filed by all the defendants.

The chancellor heard the evidence in the case and entered a decree reciting in part: That on February 7, 1910, the complainant recovered a judgment in the Probate Court of Cook County against the estate of the said deceased, Catherine Jones Matthews for the sum of $594.13 with costs, and that the said judgment continues in full force and effect and that no part of the same has been satisfied; that the indebtedness upon which the said judgment was rendered existed and was due from the said deceased to the complainant prior to December 27, 1906; that on December 27, 1906, the said deceased was the owner in fee simple of certain premises situated in Chicago, Cook Count'

Illinois, and known and described as Lot 7, etc.; that said premises were then improved with a three-story brick building consisting of saloon premises on the first floor, living apartment on the second floor and two living apartments on the third floor thereof, and that the said first and third floors thereof then had a rental value of $70 per month, and that the second floor was then occupied by deceased as her dwelling; that the said premises was then worth the sum of $10,000; that being so seized and possessed as aforesaid, the said deceased, on said December 27, 1906, by her warranty deed of that date, conveyed the said premises with the improvements thereon to the defendant, Joseph E. Williams, which conveyance was duly acknowledged and recorded on the day of the date thereof, etc.; that at the time of the execution and delivery of the said deed it was understood and agreed by and between the deceased and her said son, Joseph E. Williams, that the deceased was to retain possession of the second floor of the said premises and was to occupy the same as and for her dwelling place and was to receive all revenue, rents, including sign on the side of the building, and every cent coming from the said building during the life of deceased; that on December 29, 1906, the defendant, Joseph E. Williams, executed and delivered to deceased a writing in words as follows: "For and in consideration of the deeding of the property known as 1180 West Lake Street, I agree to resume mortgages of $4,500, and to pay all interest on same together with all taxes of same, and I further agree to give all revenue as rents, sign on side of building and every cent coming in from above building to my mother, Mrs. Carrine Matthus, as long as she lives, all checks to be made payable to her, to do with as she thinks best.

J. E. Williams (SEAL).

Witness:
Johanna Reilly."

The decree further finds that the said instrument was duly recorded in the Recorder's Office of Cook County, Illinois, etc.; that from December 27, 1906, and up to the time of her death, the said deceased Catherine Jones Matthews continued in possession of the second floor of said premises, and received and enjoyed as her own property and for her own use all rents and incomes arising from said premises; that the retaining by the deceased of the said beneficial interest in the premises aforesaid was part of the consideration for the conveyance aforesaid; that at the time of the said conveyance by the deceased to the defendant, the said deceased had no property other than the premises above described, and that no property or effects or estate of any kind belonging to said deceased has come into the hands of the said administrator of said deceased; that there is now existing on the said described premises a mortgage security in the nature of a principal note and trust deed securing the same, dated September 21, 1907, executed by Joseph E. Williams and wife, to one Archie C. Tisdale, and which trust deed is recorded in the Recorder's Office, etc.; that said principal note is for the sum of $5,000; that said note and trust deed are held and owned by the defendant William M. Haynes, and that the said trust deed is a first valid lien upon all of the said described premises for the full amount of the indebtedness therein mentioned, and that at the time of the execution and delivery of the said note and trust deed the said Haynes had no notice of the rights of complainant herein and is a bona fide purchaser of the above described premises to the extent of the indebtedness secured by said trust deed; "It is therefore ordered, adjudged and decreed by the court that the said conveyance above described and being the deed of conveyance dated December 27, 1906, executed by Catherine Matthews and

William Matthews, to Joseph Edward Williams, conveying the premises above described, and which deed was recorded in the Recorder's Office of the said Cook County on the day of the date thereof as document No. 3971065, be and the same is hereby vacated and set aside and declared null and void. * * * It is further ordered that complainant recover his costs in this cause expended, and that execution may issue therefor."

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The defendant first contends that the complainant did not prove, by competent evidence, that the debt of the deceased, Catherine Jones Matthews, upon which the judgment of the Probate Court was rendered in favor of the complainant, existed prior to the conveyance from Catherine Jones Matthews to the defendant, Joseph E. Williams. We find from an examination of the record that the complainant made proper and sufficient proof on the point in question.

The defendant next contends that the chancellor erred in refusing to admit in evidence an account filed in the Probate Court by Catherine Jones (a former name of the deceased Catherine Jones Matthews) as executrix of the estate of Richard Jones, deceased. There is no merit in this contention. The obvious purpose of the offer was to show that the debt upon which the judgment of the Probate Court was rendered against the estate of Catherine Jones Matthews and in favor of the complainant had been in fact paid to the complainant by the deceased in her lifetime. The defendant had no right to make this collateral attack on the said judgment, and the chancellor ruled correctly in refusing to admit the evidence in question.

The defendant next contends that the chancellor erred in decreeing that the conveyance from Catherine Matthews and William Matthews, her husband, to the defendant Joseph E. Williams

"be and the same is hereby vacated, set aside and declared null and void." The position of the defendant is that the chancellor, under the prayer of the bill and under the findings of fact in the decree, had not the power to declare the conveyance void in toto; that at most, the said conveyance could only have been vacated and set aside as to the complainant. There is merit in this contention. The complainant, in the prayer of his bill, only asks "that upon a hearing hereof, the said conveyance including the deed thereof as to the orator may be set aside, vacated and declared null and void." The decree must conform to the prayer of the bill. Gage v. Curtis, 122 Ill. 520; Langlois v. People, 212 Ill. 85. Further, that part of the decree that sets aside the conveyance is based upon a finding that the conveyance was a constructive fraud, not an actual fraud, as to the complainant. The decree should therefore have vacated and set aside the conveyance as to the complainant, only. The complainant insists that the chancellor was justified under the findings of facts, in setting aside the conveyance in toto, and the case of Lawson, et al. v. Punk, 108 Ill. 502, is cited by him in support of his contention. In the case cited the decree recited that the conveyance in question in that case was null and void as to the complainant in that case. In the present case, not only does the decree go beyond the prayer of the bill, but the complainant in the bill has admitted that the defendant Haymes has acquired a valid lien on the property in question, under the trust deed executed by the defendant Williams, since the execution of the conveyance from Catherine Jones Matthews to the said defendant.

The complainant, with much earnestness, insists that there is no other way he can realize on his decree in this case, save in the Probate Court; that in that court, under the present decree, he may start proceedings to sell the real estate in ques-

tion to satisfy his claim, but that if this court should hold that the chancellor erred in decreeing that the conveyance was void in toto, it would leave him without any remedy to enforce his claim. While such an argument cannot, of course, control our decision on the point in question, nevertheless, we are impelled to say that we are unable to agree with the complainant that the effect of our decision may be to deprive him of the power to enforce his claim. We see no good reason why he cannot, if he so desires and if he takes proper steps in the premises, enforce his claim in the present proceedings.

For the error indicated the decree of the Superior Court of Cook County will be reversed and the cause will be remanded for further proceedings in harmony with this opinion.

DECREE REVERSED AND REMANDED.

445 - 18915.

185 I.A. 500

WEST COAST TIMBER COMPANY, Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT
MARVIN HUGHITT, Jr., DAVID K. JEFFRIS, and FRED J. JEFFRIS, Appellants.	)	COOK COUNTY.

STATEMENT OF THE CASE. On May 23, 1911, the appellee, hereinafter designated as the plaintiff, commenced a suit in assumpsit in the Circuit Court of Cook County, against the appellants, hereinafter designated as the defendants. The declaration contained the ordinary common counts only; with the declaration was filed an affidavit of claim to the effect that the defendants were indebted to the plaintiff in the sum of $2150.03. The defendants filed four pleas, first, the general issue; second, the five years Statute of Limitations; third, nul tiel corporation; fourth, that the plaintiff was a foreign corporation doing business in this State without a license, etc. To the second plea of the defendants the plaintiff replied double, first, that each of the causes of action did accrue within five years, etc.; second, that the several causes of action were based upon written evidences of indebtedness in writing, and that the action was commenced within ten years, etc. To the fourth plea the plaintiff replied in effect that it was a foreign corporation but that it was not and had not been doing business in the State of Illinois. The defendants, with their pleas, filed an affidavit of defense as follows:

> "That the defendants did not undertake and promise in manner and form as the plaintiff has alleged against them.
>
> That each of the causes of action set forth in the plaintiff's declaration accrued more than five years next preceding the commencement of said suit.
>
> That the plaintiff is a foreign corporation, doing business in the State of Illinois, and that it had not complied with the laws of the said state and that it had not complied with the laws of the State of Illinois in reference to obtaining a certificate or license to do business in said state."

The plaintiff, before trial, filed the following bill of particulars in the case:

"BE IT REMEMBERED, that on the 22nd day of July, A.D., 1911, there was filed in the office of the Clerk of said Court a certain bill of particulars, which bill of particulars is in the words and figures following, to-wit:

'And now comes the plaintiff by Allen T. Mills, its attorney, and shows to the court that the plaintiff's cause of action is based upon a claim for money due and unpaid as the purchase price of lumber shipped to the defendants at their request by the plaintiff at or about the dates hereinafter specified respectively:

On or about Jan. 2, 1906, 1 carload of lumber, generally known as car siding, and subsequently received by the defendants, said carload containing 14,579 feet, for which the defendants agreed to pay the sum of $28.30 per thousand	$412.23
On or about Jan. 17, 1906, 1 carload of lumber shipped to the defendants and subsequently received by them, said lumber being generally known as car siding, said carload containing 23,277 feet, for which the defendants promised and agreed to pay the sum of $28.30 per thousand	657.99
On or about March 29, 1906, 1 carload of lumber generally known as car siding, shipped to the defendants at their request, and subsequently received by them, containing 25,599 feet, at $28.30 per thousand . . .	724.45
On or about May 26, 1906, 1 carload of lumber shipped to the defendants and subsequently received by them, said lumber being what is generally known as car sills, said car containing 12, 165 feet at $32.50 per thousand .	395.36
Total	$2,190.03"

The case was tried before a court and jury and a verdict was returned finding the issues for the plaintiff and assessing its damages in the sum of $1523; judgment was rendered upon the verdict, and this appeal followed.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The defendants insist that the evidence shows that the plaintiff is a foreign corporation doing business in this State, without having complied with the statute of this State, requiring foreign corporations to obtain a license before doing business in this State and that therefore the plaintiff cannot maintain this action. The plaintiff - engaged in the lumber business in the State of Washington - admits that it is a foreign corporation, and that it has not obtained a license to do business in this State, but it insists that the evidence does not prove that it has been doing business in this State, within the meaning of the statute in question. We find from the evidence that the plaintiff had no places of business in the State of Illinois; that it maintained no office in this State; that it had a solicitor in the city of Chicago who solicited orders for it; that any orders obtained by this solicitor were sent to the office of the plaintiff in Seattle, Washington; that all orders wer taken by the said solicitor, subject to the approval and acceptance by the plaintiff; that all lumber sold in this State was sent by the plaintiff from the State of Washington direct to the purchasers. Certain letter-heads of the plaintiff contained the following printed words, "Branch Office, 1347 Monadnock Block, Chicago." After a careful consideration of the late cases on this subject, we have reached the conclusion that these facts do not prove that the plaintiff was doing business within the meaning of the statute in question, (The Lehigh Portland Cement Co. v. McLean, 245 Ill. 326; International Text Book Co. v. Pigg, 217 U.S. 91; Pressed Radiator Co. v. Hughes, 135 Ill. App. 86.)

The defendants next insist that the plaintiff did not ship all of the lumber contracted for, and that the defendants thereby suffered a loss, and that they had the right to recoup

the amount of the said loss in the present proceedings. Over the objection of the plaintiff the court allowed the defendants to introduce evidence in support of this claim. The defendants insist that the proof shows that they were damaged to the amount of $500, but that the jury, in its verdict, has allowed them nothing on account of this claim. Assuming that the defendants under the affidavit of merits filed by them had the right to recoup for the alleged damages, still, we are satisfied that the evidence offered in support of their claim was of such an unsatisfactory and inconclusive character, that the jury was justified in not allowing it. But it would seem that the defendants were not entitled to make this defense. The present case is an action on contract for the payment of money, and the plaintiff filed an affidavit of claim, setting out the nature of its demand and the amount due it from the defendants; and the defendants, in compliance with the statute, filed with their pleas an affidavit of merits setting up the defenses to the plaintiff's claim. In this affidavit, the defense of recoupment for the alleged damages is not stated. The defendants thereby waived this defense. (Madison v. Fortune Bros. Brewing Co., 183 Ill. App. 276, 278.) It follows that the trial court should not have admitted (over the objection of the plaintiff) the evidence to sustain this claim, and the defendants are not entitled to urge the claim in this court.

The plaintiff sued to recover from the defendants the price of four carloads of lumber. Two of these cars were shipped in January, 1906, one in March, 1906, and one on May 26, 1906. The defendants claim that the suit of the plaintiff is predicated upon an unwritten contract, and that as the present suit was not commenced until May 23, 1911, the claim of the plaintiff, as to the first three carloads of lumber is barred by the five years Statute of Limitations. It appears that the

four carloads in question were parts of two orders given by the defendants, and it further appears that at the time of the last shipment neither of the two orders had been completed. It further appears that the defendants claimed that the two orders were meant to apply to one contract. It clearly appears that the defendants insisted, that under the said contract they were not obliged to pay anything to the plaintiff until all of the lumber contracted for had been delivered. On October 29, 1906, the attorney of the plaintiff sent to the defendant company the following letter:

"Chicago Car Lumber Co.,
504 Pullman Bldg.,
Chicago.

Dear Sirs:

The West Coast Timber Company have placed in my care for collection an account against you for lumber sold and delivered to you amounting to $2,190.05. Please pay the same within the next three days, or make some satisfactory arrangement with me in regard to a settlement of the matter, otherwise I shall be compelled to resort to legal remedies.

Yours very truly,
ALLEN G. MILLS."

To this letter the defendants sent the following reply:

"CHICAGO CAR LUMBER CO.
Chicago 10/29/06.

Allen G. Mills, Esq.,
532 Monadnock Block,
Chicago.

Dear Sir:

Replying to your favor of October 29, will say that we are ready to pay the West Coast Timber Company when they ship us the material which we contracted with them for delivery and which they have partially filled. Their representative here took the order from us in good faith and will so testify, and we shall expect the same to be filled before making them any settlement.

We would be glad to have you call at our office and will explain the matter to you in detail if you will make an appointment with me over the telephone. If this does not meet with your approval, go ahead with your 'resort to legal remedies'.

Yours very truly,
CHICAGO CAR LUMBER COMPANY,
y D. K. JEFFRIS."

At the time these two letters were written the four carloads of lumber, for which the plaintiff sued the defendants, had been

long since delivered. It is clear from the defendants' letter that they regarded each shipment as a part performance of one order - in other words, a partial execution of an entire contract. The defendants in a number of letters sent by them to the plaintiff, and also in an interview with the president of the plaintiff company, insisted - in effect - that they had but one transaction with the plaintiff and that they were not obliged to pay the plaintiff anything until the two orders covering the one transaction had been filled. "If the several items are merely parts of one transaction, the statute begins to run from the date of the last item and all the others are saved from the bar." (O'Brien v. Sexton, 140 Ill. 523.) As it is conceded that the last shipment in plaintiff's claim is within the period of the statute, under the rule laid down in the last mentioned case, all the shipments in the claim are saved from the bar of the statute.

The plaintiff insists that, even if it be conceded that each of the four shipments involve a separate transaction, still under the facts of the case the doctrine of mutual accounts applies, and that the Statute of Limitations would not commence to run as to any of the transactions until the date of the last delivery. The plaintiff further insists that the contract between the parties consisted of written orders from the defendants, which were accepted by the plaintiff: that this contract constituted an agreement in writing, and that therefore the right of recovery was not barred by the five years Statute of Limitations. In the view that we have taken of the defendants' present assignment of error, we have not deemed it necessary to pass upon these contentions of the plaintiff.

The defendants have argued a number of other assignments of error, but we do not deem it necessary to refer to these in detail for the following reasons: If we are correct in our

conclusions that the plaintiff was not doing business in Illinois within the meaning of the statute, and that the Statute of Limitations does not bar any of the items of the plaintiff's claim, and that the defendants were not entitled to recoup for the alleged damages, then it follows with absolute certainty, under the facts in the case and under the law of the case, that the verdict of the jury is the only just one that could have been rendered, and none of the defendants' assignments of errors that we have not referred to in detail could possibly have prejudiced the rights of the defendants.

The undisputed evidence in the case shows that the defendants received the lumber in question, and that they did not pay for the same. It is apparent from a careful reading of the record that considerable feeling developed between the parties to this suit, and that, as a consequence, the defendants determined to fight the claim of the plaintiff, regardless of its merits. We believe that the defendants have had a fair trial, and that the verdict of the jury is the only just one that could have been rendered under the evidence and the law, and the judgment of the Circuit Court is therefore affirmed.

AFFIRMED.

October
447 - 18918

JOHNSON SIMONET,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

185 I.A. 519

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE WOLFE
DELIVERED THE OPINION OF THE COURT.

Plaintiff, a passenger on a west bound car of the defendant street railway company on 47th street, was injured in alighting from the car at Rockwell street, and for such injuries recovered a judgment against the defendant for $1500, to reverse which this appeal is prosecuted. The conductor stood on the rear platform and by a bell signalled the motorman to stop and start the car. A sliding door controlled by the motorman enclosed the front platform. Plaintiff signalled the conductor by means of a push bell to stop the car at Rockwell street, and the conductor signalled the motorman to stop at that street. Plaintiff and a witness called by him went out on the front platform, the car stopped, the motorman opened the door and the witness safely alighted from the car, but the plaintiff in alighting from the car suffered the injuries complained of.

The negligence alleged in the first count of the declaration is, that while said car was stopped, "defendant carelessly and negligently caused the said car to be suddenly and violently started and moved and thereby plaintiff" was thrown from said car to the ground and injured. The negligence alleged in the second count is, that upon the arrival of the car at Rockwell street and while plaintiff was about to

alight therefrom, "the defendant carelessly and negligently sounded the gong or bell for the said car to be started and moved while the plaintiff was thus alighting and then and there said defendant in response to said gong hurriedly, quickly and suddenly started said car and the plaintiff was thereby thrown" from the car and injured. The third count avers that defendant "carelessly and negligently caused the said car to be suddenly and violently started and moved with a jerk and surge forward, and thereby plaintiff" was thrown from the car and injured.

The contention of appellant that the verdict is not justified by and is against the manifest weight of the evidence is based on the contention that there is no averment in the declaration charging negligence in prematurely starting the car; that the only negligence charged in any count "is in starting the car suddenly and with a jerk", which, it is insisted, is an entirely different act from starting it prematurely and before a passenger has time to alight.

The evidence fails to show that the car was started with a jerk, but we think that from the evidence the jury might properly find that the car was started while plaintiff was alighting therefrom, and by such starting of the car he was thrown from the car and injured, and we farther think that the jury might properly find that in so starting the car the defendant was guilty of negligence, which directly caused plaintiff's injury, and that plaintiff was not guilty of contributory negligence.

The Court gave for the defendant among others the following instructions:

"20. If you believe from the evidence and under the instructions of the court that the plaintiff stepped or jumped off the car while the car was in motion, and that in so doing he failed to exercise ordinary care for his own safety, and was injured as a direct result

thereof, then the plaintiff was guilty of contributory negligence and he cannot recover.

"21. Even if you believe from the evidence that the car stopped at the place in question and started up before the plaintiff had sufficient time to alight from the car, still that fact of itself does not prove negligence on the part of the defendant nor does it entitle the plaintiff to recover, unless the plaintiff has further proven by a preponderance of the evidence and under the court's instructions that the plaintiff, without any fault on his part, was caused to fall and be injured by the movement of the car itself in so starting.

"22. The plaintiff in each count of his declaration alleges that he was thrown to the ground and injured as a result of the car being started while he was in the act of or about to alight from the car. If you believe from the evidence that he was not thrown to the ground by reason of any starting or moving of the car, but that he stepped or jumped off the car and was thrown and injured as a direct result of his own act in so doing, then he cannot recover."

We are unable to concur in the contention of appellant that the only negligence charged in any count of the declaration, "is in starting the car suddenly and with a jerk." The second count avers that while plaintiff was alighting from the car the defendant in response to the gong sounded as a signal for the car to be started, "hurriedly, quickly and suddenly started said car" and thereby plaintiff was thrown from the car, etc. This is not an averment that the car was started with a jerk or surge forward, but that it was "hurriedly, quickly and suddenly" started after the signal was given. The averment relates to the time when the car was started after the signal was given, and not to the manner in which the car was started. We do not think that on the pleadings and evidence in this record the verdict should be disturbed on the ground that it is not justified by, but is against, the evidence. There is in the declaration no averment of mental suffering by the plaintiff nor is there any evidence of such suffering, and instruction 16, which told the jury that he might recover for "his suffering in mind" should not have been given; but we do not think the judgment should be reversed because of the instruction in question.

We find no error in the other instructions given for the plaintiff, nor any reversible error in the refusal of instructions asked by the defendant.

We do not think that in view of the evidence as to the nature of plaintiff's injuries and the results, the damages awarded by the jury can be held excessive.

The record is free from reversible error and the judgment is affirmed.

AFFIRMED.

Bulletin No. 1, 1917 Term.

458 - 18929

185 I.A. 521

J. J. WALSH,
Appellee,

vs.

CITY OF CHICAGO,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BAKER
DELIVERED THE OPINION OF THE COURT.

In an action in the Municipal Court by plaintiff Walsh against the City of Chicago to recover the amount claimed to be due on a contract for transporting garbage, the Court struck defendant's affidavit of "merits" from the files, ordered, "that judgment be entered herein against said defendant by default for want of such affidavit of defense", assessed plaintiff's damages at the sum of $1200, rendered judgment against defendant for that sum and costs, and defendant appealed.

The contract sued on is in writing and provides that Walsh shall transport boxes of garbage from loading stationsalong the Chicago river to a certain plant at 38th and Iron streets and return the empty garbage boxes during the term of one year from August 31, 191 . The specifications are attached to and made part of the contract. They provide that Walsh shall furnish seaworthy boats, each with capacity to carry safely 150 regulation garbage wagon boxes at one time; that the City shall deliver the full boxes on the boats and Walsh shall then take the boats to said plant and tie them up at the dock there and after the boxes are emptied shall return them to the loading stations. For such work the contract provides that the City shall pay Walsh $67.50 per day.

The affidavit of defense sets out the contract

and specifications and states that the plaintiff used in performing his work a certain boat which was not seaworthy, and was in such bad condition that the use of the same was dangerous; and the plaintiff in so using said boat did not use reasonable care in carrying out said contract; that by reason of the defective condition of said boat the same sank while carrying certain of the defendant's garbage boxes and other receptacles of great value, and obstructed the harbor of the City of Chicago; that the boat sank October 17, 191[illegible]; that it was necessary to use the garbage receptacles sunk and to dispose of the garbage that was being hauled, and for those and other reasons the City ordered a certain company to raise said boat; that the same was raised and the City paid said company $347.[illegible] therefor, which was a fair and reasonable charge for the work done.

We think that the facts stated in the affidavit well and sufficiently show a breach of the contract by the plaintiff, in using and employing an unfit and unseaworthy boat, and consequent damage to the defendant. Defendant's claim for damages arose under the same contract and out of the same relation that the plaintiff's claim for compensation arose, and the defendant had the right to deduct, to recoup from plaintiff's claim, the damages it had sustained by reason of plaintiff's breach of the contract.

The question of the right of the defendant to declare the contract forfeited is not presented, for there was no forfeiture or attempted forfeiture of the contract.

We think the Court erred in striking from the files defendant's amended affidavit of defense, and for that error the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

470 - 18941

WILLIAM S. TAIT,
Appellee,

vs.

CHICAGO STRUCTURAL TILE COMPANY,
Appellant.

185 I.A. 522

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE BAKER
DELIVERED THE OPINION OF THE COURT.

By a contract in writing plaintiff Tait was employed by the defendant corporation as manager for a period of two years from April 12, 1910, at a salary of $100 per month. The contract does not provide for the payment by the corporation for plaintiff's midday meals, or car fare between his residence and the office of defendant. Tait brought assumpsit in the County Court against the defendant for money laid out and for salary due. He had judgment for $441.13, one hundred dollars of which at least was for expenses, and the defendant appealed. Tait has not filed a brief in this Court. He testified that he made entries of such expenses in his cash book and copied such entries into another book, which he produced, and that the original cash book was at his home. He was then permitted, over the objections of the defendant, to read the entries of expenses from the book produced. He also testified to a conversation with Irvine, president of defendant corporation, in reference to his expenses. Counsel for defendant called Irvine as a witness and was proceeding to examine him as to his conversation with Tait when he was stopped by the Court. He then offered to prove by Irvine that in such conversation with Tait, Irvine said: "I don't want you to expend any money on behalf of this company, as an expense account,

without my orders in advance for you to do so"; but the Court, on the objection of the plaintiff, excluded the testimony so offered and defendant excepted. We think the testimony was admissible, and for the error in excluding it the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

521 - 16992

185 I.A. 526

LUMIA RASMUSSEN,
Appellee,

vs.

JULIA F. DRAKE, Executrix of the Last Will and Testament of FREDERICK J. DRAKE, deceased,
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

Plaintiff Rasmussen recovered in the Circuit Court a judgment for $2500.00 against Frederick J. Drake for injuries received by her by being struck by an automobile of the defendant through the alleged negligence of the servant of the defendant, the driver thereof. Pending the appeal Drake died and his executrix was substituted as appellant.

Plaintiff was a passenger on a south bound street car on Evanston avenue, which stopped regularly on signal to take on and discharge passengers on each side of Sheridan Road. The conductor, on her signal, stopped the car on the south side of Sheridan Road and plaintiff alighted from the west side of the rear platform and started to go to the west side of the street. Defendant's automobile was following the car, and when it stopped the driver turned out to the west and proceeded south along the west side of the car. In doing so the machine struck the plaintiff, who had taken but a step or two from the car, and inflicted the injuries complained of.

No complaint is made of the instructions, and we find no reversible error in the rulings of the Court on questions of evidence. Whether the automobile was negligently operated and whether the plaintiff was guilty of contributory

negligence were, on the evidence, questions of fact, on which the verdict of the jury must be held conclusive.

The only plea was not guilty, which, under the well settled rule in this State, admitted the operation of the automobile by the defendant. The only evidence on the subject was the testimony of a witness called by the plaintiff as to a conversation between the witness and the defendant. This case is not within the rule announced in Johnson v. Johnson, 166 Ill. App. 422; that where a material fact is treated as in issue by both parties, and evidence offered on the one side to maintain and on the other to controvert such fact, it will be regarded by a court of review as put in issue by the pleadings.

The record is free from reversible rrror, and the judgment is affirmed.

AFFIRMED.

423 - 18890

185 I.A. 547

JOHN CERVENKA,
Appellee,

vs.

EDWARD R. HUNTER and
JENNIE HUNTER,
Appellants.

APPEAL FROM THE CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

The appellee in this case recovered August 3, 1911, a judgment by confession against the appellants, Edward R. Hunter and Jennie Hunter, in the Circuit Court of Cook County, for $215. The confession was made under a warrant of attorney incorporated in a promissory note for $200, payable thirty days after its date of July 1, 1911, with interest at six per cent. after its maturity until paid. Inclusion of fifteen dollars for attorney's fees was authorized by the warrant of attorney.

On motion of the defendants leave was given to them August 8, 1911, to plead to the plaintiff's declaration within ten days, the judgment theretofore rendered to stand as security.

August 18, 1911, the defendants filed three pleas: 1, non assumpsit; 2, that when the plaintiff performed the alleged services for which the note sued on was given he was acting as a real estate broker and his services in that capacity were the consideration for the note, and that at the time said services were rendered the plaintiff was not duly licensed by the City of Chicago to act as a real estate broker. The third plea is the same as the second except in adding that in acting as a real estate broker the plaintiff was performing said services in violation of chapter 14, sections 192-195 and

198 of the Revised Municipal Code of Chicago of 1905.

January 24, 1912, the defendants filed an additional plea amplifying the allegations as to the lack of a license by the plaintiff and pleading certain sections of chapter 15 of the Chicago Code of 1911 requiring such license. January 29, 1912, the plaintiff filed a replication to the pleas, averring that "at the time the said services for which the said note was given were rendered, plaintiff was not acting as a general real estate broker and conducting a real estate brokerage business requiring any license, as provided by the city ordinances."

On these pleadings the case went to a jury. After the evidence on both sides was heard the Court instructed the jury to find the issues for the plaintiff and assess the plaintiff's damages at $215. Then after a motion for a new trial and a motion in arrest of judgment had been made and overruled, the Court, February 24, 1912, entered a judgment that the plaintiff have and recover of the defendant Two Hundred and Fifteen Dollars and his costs. This was undoubtedly irregular, because the judgment which was entered August 3, 1911, still stood on the record according to the order of August 8, 1911.

The judgment should have been in the form set forth in Lyman et al. v. Kline, 128 Ill. App. 497, and Northeastern Coal Company v. Tyrrell, 133 Ill. App. 472.

But as we said in Lyman et al. v. Kline, supra, "such error can be corrected without affecting the merits of the cause or the rights of appellants."

From the judgment of February 24, 1912, the defendants appealed to this Court, and as among the errors assigned is one that the Court erred in entering two judgments in the cause, we must, for this error, which is well

assigned, remand the cause for a correction of the judgment. But we find no reason to do so for a new trial. There is no error affecting the merits of the cause.

It is insisted that the bill of exceptions shows that the peremptory instruction was oral and not written, and therefore erroneous. We do not think this is shown. Counsel moved for a directed verdict, and it was apparently after a written motion comprehending an instruction had been prepared by him that the Court read the instruction to the jury. But it is immaterial. If it were not so, the error is not a reversible one. The objection that the instruction was not in writing was not given among the reasons for a new trial which was in writing and specified those reasons, nor is it among the assignments of error. Moreover it is our opinion that independent of any instruction, no other verdict than one finding the issues for the plaintiff could have been properly returned.

The defense was entirely based on the position that the plaintiff Cervenka, in negotiating an exchange of real estate between the defendants and certain parties in Chicago, was acting as a real estate broker of Chicago and could recover no brokerage fees because he had no license from that City, and that the note sued on was given for such fees. But the evidence is that the employment was in Wisconsin, that the appellants' property exchanged for Chicago property was in Wisconsin, that the conveyances in the exchange were made in Chicago, that the note, although payable in Chicago, was given in Wisconsin as compensation for his services according to his employment. No license from the City of Chicago was required for this transaction. The evidence ruled out concerning other transactions of the plaintiff and the rentals of the Chicago property was immaterial.

The cause is remanded to the Circuit Court with instructions to amend the judgment of February 24, 1912, by substituting for the words -

"Therefore it is considered by the Court that the plaintiff do have and recover of and from the defendant his said damages of Two Hundred and Fifteen Dollars in form as aforesaid by the jury assessed, together with his costs and charges in this behalf expended and have execution therefor",

the following words -

"Therefore it is considered by the Court that the judgment entered herein on August 3, 1911, in favor of the plaintiff and against defendants for Two Hundred and Fifteen Dollars ($215) and costs stand in full force and effect as of the time of its rendition, and that the plaintiff have execution thereon."

Neither party is to recover costs in this Court.

REMANDED WITH DIRECTIONS AS TO

AMENDMENT OF JUDGMENT.

436 - 18906

NATIONAL BREWING COMPANY,
Appellant,

vs.

PETER I. GUMINSKI and
MARY GUMINSKI,
Appellees.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

February 9, 1912, the appellant in this case, the National Brewing Company, recovered a judgment in the Superior Court of Cook County against the appellees, Peter I. Guminski and Mary Guminski, for $2787.50. The judgment was entered by the confession of the said appellees evidenced by a cognovit executed by an attorney under a warrant of attorney incorporated in a demand note for $2500 signed by the said Peter I. and Mary Guminski, dated October 1, 1910, and payable to the order of the National Brewing Company with interest at seven per cent. after maturity. The warrant of attorney to any attorney of any court of record authorized the confession of judgment in favor of the holder of the note for such sum as might appear unpaid, with costs and fifty dollars attorney's fees.

February 27, 1912, on motion of the defendants - appellees here - the judgment was set aside and vacated and leave given to the defendants to plead within five days.

February 28, 1912, the order of February 27th was set aside, but leave was given the defendants to plead "as to the merits" within five days, "the judgment heretofore entered herein on the ninth day of February, A. D. 1912, to stand as security." On that day the defendants filed three pleas to the declaration, which was filed with the cognovit in

the usual form of a declaration on a promissory note.

The first plea alleged that on October 28, 1911, the plaintiff released to the defendants the cause of action set forth in the plaintiff's declaration and discharged the defendants from said indebtedness. The second averred that on October 28, 1911, the defendants paid to the plaintiff and the plaintiff accepted a certain right or privilege to the renewal of a license for conducting a saloon within the city of Chicago, which said license or renewal right was the property of the defendants and of the value of $2800, in full satisfaction and discharge of the promises and sums of money mentioned in the declaration. The third plea asserted that on October 28, 1911, "an account was stated" between the plaintiff and the defendants, and the plaintiff and defendants

"entered into an agreement whereby the defendants agreed to transfer unto the plaintiff a certain right to the renewal of a license for the conducting of a saloon in the city of Chicago in said County, which right of renewal was then and there of the value of $2800 and was the property of the defendants, and in consideration of such right of renewal being transferred and surrendered to the plaintiff, the plaintiff agreed to cancel, satisfy and discharge the indebtedness mentioned in the plaintiff's said declaration and evidenced by the promissory note therein mentioned, and the defendants thereupon surrendered the right of renewal to the plaintiff and the plaintiff received and accepted the same and ever since has possessed and used the same, whereby the said several promises made in the plaintiff's declaration have become and are fully released, discharged and satisfied."

To these pleas was annexed an affidavit of Peter P. Guminski that the "nature of the defense" was that the debt evidenced by the promissory note was fully paid and discharged before the suit was commenced.

As appears by the bill of exceptions before us in the transcript of the record, a rather irregularly conducted trial on the issues thus formed took place before the Court, without a jury, in which trial the hearings were intermitted for months and resulted finally in the determination of the Judge to find for the defendants, signified by a written commu-

nication from him to the attorneys for the parties, that he would on the next day but one, which was July 13, 1912, enter the following order:

"Judgment of February 9, 1912, vacated finding on issues for defendant and costs against plaintiff."

On July 13, 1912, the parties appeared and the counsel for the plaintiffs tendered to the Court several propositions of law, stating:

That on June 1[illegible], when the court had taken the case under advisement to read the testimony, the Court had stated that it might require the defendants to produce more evidence and call other officers of the plaintiff company, and that therefore the plaintiff's counsel had not before submitted any propositions of law. The Judge then stated that postal cards which he had sent out had stated what his decision would be and that it was too late to offer propositions of law or mark them either held or refused, and declined to do so. A judgment of the Court was then entered which, after reciting that the Court "finds the issues for the defendants" and overrules a motion for a new trial, proceeds:

"Therefore it is considered by the Court that the judgment heretofore on the ninth day of February, A.D.1912, rendered herein in favor of the plaintiff and against the defendants by confession be and the same is hereby set aside and vacated and that the defendants do have and recover of and from the plaintiff their costs and charges in this as well as in that behalf expended and have execution therefor."

The plaintiff excepted to the entry of the judgment and was allowed an appeal "from the judgment of the Court."

The appeal bond filed in this Court recites the judgment appealed from merely as "a judgment against the above bounden National Brewery Company, a corporation, for the sum of_____dollars, costs of suit." The assignments of error, however, include one that the "Court erred in vacating the judgment of February 9, 1912."

This whole record is very unsatisfactory to us both in method and in substance.

The original vacation of the judgment and leave to the defendants to plead, entered on February 27, 1912, was within the discretion of the Court, and so also was the vacation of that order on February 28th and the order allowing the plaintiff to plead subject to the continuance of the judgment as security. A subsequent interlocutory order again vacating the judgment was also discretionary. Therefore, considering the recital of the judgment appealed from in the appeal bond, we are not disposed to reverse that portion of the judgment of July 13, 1912, which sets aside and vacates the judgment of February 9, 1912.

While a better form of the further part of the judgment, if it was to be given for the defendants, would have ordered that the plaintiff take nothing by its action and go without day, we may consider the judgment for costs a final one, since it follows in the order a finding of the issues for the defendants.

Chicago Portrait Company v. Crayon Company, 217 Ill. 206.

We do not think it should be affirmed on this record however.

One thing only appears clearly from it on the merits of the controversy - that the plaintiff held a promissory note of the defendants for money advanced or loaned to them by the plaintiff. The only defense is an alleged payment or an accord and satisfaction.

To establish either, the burden was on the defendants; and to sustain that burden the only really definite

proof in the record is evidence that about three weeks after the note sued on was given, William H. Rehm, the president of the plaintiff corporation, gave a document to the defendant written on the letterhead of the corporation and running as follows:

"It is hereby agreed between Peter Guminski and William H. Rehm that Peter Guminski will sell his old license to said William H. Rehm for $2500.00, the amount due on note which is to be cancelled. Peter Guminski to give bill of sale for same.

William H. Rehm."

If this was an executory contract it was not fulfilled. There is no contention that Peter Guminski ever made a bill of sale of "an old license" nor indeed that he ever sold any "old license" to William H. Rehm or the plaintiff corporation unless this very document evidenced such a sale.

It seems to be the theory of the defense that inasmuch as the defendant, Peter Guminski, had once had a license to keep a dramshop from May 1, 1909, to November 1, 1909, at 8460 Superior avenue, the right to a renewal or reissue of which he had conveyed to one Fred W. Wollin (who was proven to be an employee of the plaintiff corporation) on the very date of its original issue, this assignment took the place of any further conveyance contemplated by the document and made the contract for the "payment" or "accord and satisfaction" of the note one that was executed and not executory, and identified all the transactions as taking place between the plaintiff corporation and the defendants. This theory, it is urged, is fortified by the testimony of Peter Guminski that one Kowalski, an agent of the plaintiff, told him when loaning the money, receiving the note sued on, and taking the assignment of another saloon license as collateral security, that if he (Guminski) would give him (Kowalski) that license from 8460 Superior avenue, he would give him the note back.

But the whole matter is left in an unsatisfactory state by the evidence. When Wollin received the original assignment of a right to a "renewal or reissue" what, if any, consideration then passed? What right or supposed right remained in Cuminski to assign, by bill of sale or otherwise, on or after October 24, 1910? What sufficient evidence was offered that Wollin took the assignment as a representative of the Brewing Company? or even that Rehm had authority to act for the Brewing Company and was so acting?

It does not seem strange that the trial Judge before the last hearing stated that he might desire the defendants to put in other testimony and call other officers of the Brewing Company; but it does seem strange that he did not so desire before deciding the case, and that he excluded the testimony as incompetent by which the counsel for the defendants offered to prove that Cuminski in 1909 temporarily suspended business and at that time "had a talk with Mr. William Rehm, President of the National Brewing Company, at which time he loaned to Mr. William Rehm the license in question until he desired to re-establish himself in business, and that in 1910 he sold that license to William Rehm for $2500."

Perhaps the evidence thus offered might have cleared up several matters left obscure or entirely unproven by the record - among them, what right on October 24, 1910, the defendants had or was supposed to have in the license which had by its terms expired almost a year before; and whether an actual price or value was put upon that real or supposed right by the agreement of plaintiff and defendant. As the record stands at present the defendants claim that by an ordinance of the city of Chicago, which was not proven in the case and to find which we are referred by counsel to an opinion of the Supreme Court (People v. Harrison, 256 Ill., 102) which decides that no such valid ordinance exists, the holder of a license for a limited

time had a supposed perpetual right of renewal, which could be and was valued by agreement between the parties hereto at $2500, and made at that valuation the means of an accord and satisfaction.

The proof falls short of the establishment of this position. Ordinances of the City of Chicago are not the subject of judicial cognizance in the Superior Court of Cook County or in this Court. I. C. R. R. Co. v. Ashline, 171 Ill. 313; Hunson v. Fenno, 87 Ill. App. 655.

Counsel says in argument the high value of the renewal privilege sanctioned by the Harkins ordinance is evidenced by the agreement between the parties to this case. So far as this record shows there was no ordinance or purported ordinance which gave or purported to give any renewal right to a license which had expired.

The condition of the evidence is, as we have said, very unsatisfactory and except as to the portion of the judgment order of July 13, 1912, which may be treated as interlocutory and vacates the judgment entered February 9, 1912, the said judgment is reversed and the cause remanded to the Superior Court for a new trial of the issues made by the pleadings.

REVERSED AND REMANDED.

407 - 18874

UNITED STATES CAST IRON PIPE & FOUNDRY CO., a corp.,
Appellee,

vs.

CITY OF CHICAGO,
Appellant.

185 I.A. 558

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

The Foundry Company, plaintiff, claims that the defendant wrongfully deducted certain amounts from what was due it for pipe sold and delivered by plaintiff and accepted by the City, the defendant. Upon trial by the court plaintiff had judgment for the amount of these deductions, from which defendant appeals.

The contracts, of which there were five, for the sale and delivery of pipe provided that the deliveries should commence on a certain date and "to progress as follows, viz: from time to time and in such quantities at such points or places as shall be ordered by the commissioner of public works and be finished and fully completed on or before" a certain date; the dates vary in the different contracts; "the time of the commencement, rate of progress and time of completion being essential conditions of this contract." The contracts also contain the following provisions:

> "The pipe and special castings shall be delivered at the points herein designated in the City of Chicago at the expense of the contractor. The delivery of the pipe and special castings is to be commenced not later than fifteen (15) days after signing of contract, and shall be completed within thirty (30) days after signing of contract. The time of completion of the whole of this work is an essential condition of this contract, and should said contractor neglect, refuse or fail to complete the work to be done under this contract within the time hereinbefore specified, then in that event, the commissioner of public works shall have and is hereby given the right to deduct and retain out of such moneys as will be due or which may become due and pay-

able to said contractor for the work to be done under this contract, the sum of fifteen ($15) dollars per day for each and every day that the work is delayed in its completion beyond the specified time. Said sum of fifteen ($15) dollars per day for such delay, failure or noncompletion shall be deemed, taken and treated as liquidated damages, which the City of Chicago will suffer by reason of such default and not by way of penalty."

"The right is hereby reserved by the commissioner of public works to finally decide all questions arising as to the proper performance of said work in all matters. * * * The decision of the commissioner of public works shall be final between the parties hereto."

Letters were introduced in evidence, written by the plaintiff and addressed to the commissioner of public works of Chicago, requesting extension of time in which to make deliveries of pipe, and giving reasons why, in the opinion of plaintiff, it was entitled to such extension. There were also introduced various statements of account, made by the defendant and approved by the commissioner of public works, showing deductions at the rate of $15 per day for delay in completing the contracts. Neither party introduced any evidence touching the propriety of these deductions. There is no dispute as to their amount.

Plaintiff claims that the burden of justifying the deductions is upon the defendant, while the defendant claims that the burden is on plaintiff to prove performance of the contracts, which would involve proof that the deductions were not justified. We think it is clear that this burden was on the plaintiff. The basis of its claim, as stated in its statement of claim, is that these deductions were wrongfully made. This is in fact asserting that the commissioner of public works was not justified in making the deductions which he made. As there is no denial of his authority under the contract to make deductions for delay at the rate of $15 a day, the essence of plaintiff's claim of wrongful deduction must be that the contingency

authorizing such deductions had not occurred; in other words, that there had been no delay. The burden of proof is on the party asserting the affirmative of a proposition. In Harley v. Sanitary District, 226 Ill. 213, the court said, in speaking upon this question:

> "The court instructed the jury that the burden of proof was on the plaintiff to show, by a preponderance of the evidence, that the contract was wrongfully forfeited in order to enable him to recover. He alleged that fact in his declaration, in which he set out that he did not perform the contract because it was wrongfully forfeited, and we do not see any reason why the rule requiring him to prove the allegations of his declaration does not apply."

See also Bulcare et al. v. City of Chicago, 172 App. 195, and Tichenor v. Newman, 186 Ill. 264. Plaintiff having failed to prove its claim of wrongful deductions, was not entitled to judgment.

Plaintiff received payment of the balances after deductions for delay had been made, as shown by the statements of account, and it receipted for these balances on the statements as "in full payment of the within account." Letters to plaintiff from the corporation counsel clearly show that it was the understanding of the parties that by accepting these payments plaintiff did not waive any rights it might have in the amounts deducted. The letters say so in so many words.

We are of the opinion that the provision of the contracts for a deduction of $15 a day for delay must be construed as a provision for liquidated damages, and not a penalty. The language of the contracts is explicit on this point:

> "Said sum of fifteen ($15) per day for such delay, failure or noncompletion shall be deemed, taken and treated as liquidated damages, which the City of Chicago will suffer by reason of such default and not by way of penalty."

It is evident from the very nature of the circumstances that it would be almost impossible to ascertain with any accuracy the actual damages for delay. To fix the amount of damages in advance would be the sensible and expected thing to do. If the amount so agreed upon is not unreasonable courts will enforce the agreement. Poppers v. Meagher, 148 Ill. 192. Provisions almost identical with those before us have been construed as an agreement for liquidated damages in the case of Ludlow Valve Mfg. Co. v. City of Chicago, No. 18244, in an opinion by the Branch D Appellate Court, this District, filed June 12, 1913, not yet published. We see no reason why the agreement of the parties as to liquidated damages should not stand.

In the Ludlow Valve case, supra, the court had under consideration circumstances involving the question of the waiver of the provision for liquidated damages, and it was held that the city officials have no power to waive the benefit of this provision; but as this question is not raised or discussed by counsel in the case at bar, we express no opinion on that point.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

October Term, 1912, 20

407 - 18874

UNITED STATES CAST IRON PIPE & FOUNDRY CO., a corp., Appellee,

vs.

CITY OF CHICAGO, Appellant.

185 I.A. 558

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Additional Opinion by Mr. Justice McSurely on Petition for Rehearing.

It having been brought to our attention by petition for rehearing that one, and possibly two, of the contracts discussed in the opinion heretofore filed did not contain the clause providing for liquidated damages in case of delay, we would say that we considered only the points made in the briefs, and as counsel did not distinguish the contracts with reference to the law applicable thereto we treated them as alike in this regard. It is evident that our opinion concerns only such contracts as contain the clause providing for liquidated damages in case of delay. If we had been asked to pass upon the rights of the parties under contracts without such clauses, we probably would have been guided by what was said in Harber Brothers Co. v. The Moffat Cycle Co., 151 Ill. 84: "On general principles either party to a contract * * may recover as on an implied agreement for a partial performance which has been voluntarily accepted by the other with full knowledge of the breach; but subject also to the latter's right to recoup for the failure to fully perform the express contract."

REHEARING DENIED.

462 - 18933

BROWN BROTHERS MANUFACTURING COMPANY (a corporation),
Appellee,

vs.

S. H. HARRIS COMPANY (a corporation),
Appellant.

185 I.A. 568

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Brown Brothers Manufacturing Company, plaintiff, brought suit and had judgment against the defendant for damages for failure to complete a contract for furnishing certain iron doors and frames for a building in course of construction. Plaintiff had the subcontract for the iron work, and sublet to defendant the contract for stair hall doors and certain other things not in question. The contract provided that these doors "shall be made acceptable in all respects to the Architects and to the Board of Fire Underwriters." Defendant failed to furnish these doors and plaintiff let the contract for completing the work to Bniseley Brothers, which contract contained this same condition.

Defendant admits its failure to furnish the doors, but seeks to explain this by saying that the stair hall doors specified by the architects were doors having wire glass panels, and that the defendant learned that the fire underwriters would not accept and approve a stair hall door constructed with wire glass panels. From this it is attempted to draw the conclusion that the contract was impossible of performance, of which fact both parties were ignorant when it was made; hence there was a mutual mistake which rendered the contract void.

We do not agree with this conclusion. Not every mistake, even of material facts, will suffice to void a contract. Where the means of information are open to both parties and where each is supposed to exercise his own skill, diligence and judgment, a mistake of judgment on the part of either or of both of the parties will not render the undertaking void.

"Mistake or ignorance of facts in parties, is a proper subject of relief only when it constitutes a material ingredient in the contract of the parties, and disappoints their intention by a mutual error; or where it is inconsistent with good faith, and proceeds from a violation of the obligations which are imposed by law upon the conscience of either party. But where each party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference." Story's Eq. Jur., sec. 151.

The evidence shows that defendant was engaged in the business of installing fireproof doors, and had submitted doors manufactured by it to tests of the board of fire underwriters; that at times its doors were not acceptable, and sometimes they were. Defendant would therefore be presumed to have some knowledge of the kind of doors the fire underwriters would accept, and if it was a mistake on its part to contract as it did in this regard, it was a mistake of judgment which does not affect its contractual obligation.

Another reason for holding the contract valid is that it does not appear from the evidence that it was impossible of performance. There is of course nothing inherently or naturally impossible in an undertaking to furnish doors acceptable both to the architects and the fire underwriters. It is a fair inference from the evidence that Kniseley Brothers, who succeeded defendant, successfully furnished such doors. There is in the evidence no rules or action by

the fire underwriters rejecting such doors, and, in fact, no doors were ever tendered by the defendant. The only testimony as to the attitude of the fire underwriters is that of the president of the defendant company, who says that he informed an officer of the plaintiff company that he (defendant's president) had been told over the telephone by the "surveyor" of the board of underwriters that wire glass would not be allowed in stairway doors. We are of the opinion that it has not been established that the contract was impossible of performance.

What was said in Walker v. Tucker, 70 Ill. 527 (543), is in point:

> "The appellants are expressly bound by their covenant, 'to work the said coal mine during the continuance of this lease and agreement in a good and workmanlike manner.' It was incumbent on appellants to know, and the presumption is they did know, when they made this covenant, the difficulties to be encountered in performing it. It is elementary law that, when the contract is to do a thing which is possible in itself, the promiser will be liable for a breach thereof, notwithstanding it was beyond his power to perform it, for it was his own fault to run the risk of undertaking to perform an impossibility, when he might have provided against it by his contract. 1 Chitty on Conts. (11 Am. Ed.) 1074."

Also the statement in Parson's on Contracts, vol. 2, sec. 673:

> "If one for a valuable consideration promises another to do that which is in fact impossible, but the promise is not obtained by actual or constructive fraud, and is not on its face obviously impossible, there seems no reason why the promisor should not be held to pay damages for the breach of the contract; not, in fact, for not doing what cannot be done, but for undertaking and promising to do it. So if it becomes impossible by contingencies which should have been foreseen and provided against in the contract, and still more if they might have been prevented, the promisor should by held answerable. So if the impossibility applies to the promisor personally, there being no natural impossibility in the thing, this will not be a sufficient excuse."

The variant testimony concerning what was said at the meeting in the architects' office with reference to an adjustment of the difficulties defendant claimed to be in, was properly submitted to the jury. Defendant sought

to show that some agreement favorable to it was made, while plaintiff claims that defendant simply told plaintiff to get someone else to do the work. The verdict of the jury indicates its belief in plaintiff's version, and we see no reason to differ therefrom.

Other points made by the defendant have been considered but are not of sufficient importance to effect any change in our conclusion that the judgment is correct and should be affirmed.

AFFIRMED.

503 - 18974

DANIEL McFADDEN,
Appellee,

vs.

ADAMS EXPRESS COMPANY,
Appellant.

185 I.A. 572

Appeal from
Circuit Court,
Cook County.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an action of trespass for false imprisonment in which the plaintiff had judgment for $1,500, from which defendant appeals.

Defendant is a carrier of goods, and its business in Chicago is under the supervision of a general agent, named Brooke. Brooke hired one Kluessner, formerly employed by the Pinkerton Detective Agency, ostensibly to act as a porter, but his real duties were to watch the employes, investigate lost shipments or shortages, and in general to do the work of a detective for the defendant, reporting to Brooke every evening. It is said he was instructed to make no arrests except as he might be directed. A package containing jewelry was stolen from a room in one of defendant's buildings and Kluessner was instructed to investigate the matter. He made inquiries of various persons, which evidently resulted in his suspecting that the theft was committed by the plaintiff, who was a driver employed by the defendant. Police officers were sent for, plaintiff was arrested, taken to the station and locked up. The next morning Kluessner reported this to the general manager, Brooke, who directed that plaintiff should be held until 5:00 o'clock that evening in order that it might be ascertained whether there was any police record against plaintiff or if his picture was in the "Rogues' Gallery." No such record or picture being found, Kluessner, acting under Brooke's

instructions, told the officer that evening at the police station that the company did not intend to prosecute plaintiff, and plaintiff was set free. As there must be another trial, we have given an outline only of the occurrence.

In his opening statement plaintiff's counsel was permitted by the court to describe a visit by Kluessner and two police officers to the home of plaintiff's fianceeafter the arrest, and although this was objected to he was allowed to refer to it repeatedly and to examine witnesses concerning it. A typical statement by plaintiff's counsel is this: "We have alleged specifically the treatment of this man, and I am now going to show how he treated these other people." He then stated what he proposed to show, and was permitted to introduce evidence that Kluessner and the police officers called at the house where a young lady lived who had been keeping company with the plaintiff, late at night after the family had retired; that they aroused the family and went into the bedroom of plaintiff's friend, although she was only partially clothed; searched her dresser, accused her of receiving jewelry from the plaintiff, and accused her of having had improper relations with plaintiff. Plaintiff's counsel also made a statement to the jury that plaintiff had been beaten at the station by a police officer, and although objection to this was sustained, yet counsel continued in attempting to get, and succeeded in getting, the matter before the jury. There was also permitted testimony concerning the alleged bad conditions in the station where plaintiff was confined, and also as to improper quality and quantity of food which he was given. The court also admitted testimony to the effect that Kluessner apologized for insulting the women in the house of plaintiff's fiance. Many other bits of evidence or statements by counsel for the plaintiff, similar to those herein related, were brought to the attention of the jury. Such statements,made by plaintiff's counsel, and

the admission of such evidence were improper and highly prejudicial to the defendant. In 1 Chitty's Pleading, 397, the rule is stated thus:

> "Whenever the damages sustained have not necessarily accrued from the act complained of, and consequently are not implied by law, then, in order to prevent the surprise on the defendant which might otherwise ensue on the trial, the plaintiff must, in general, state the particular damage which he has sustained, or he will not be permitted to give evidence of it. Thus, in an action of trespass and false imprisonment, when the plaintiff offered to give in evidence that during his imprisonment he was stinted in his allowance of food, he was not permitted to do so because the fact was not, as it should have been, stated in his declaration."

In Miles v. Weston, 60 Ill. 361 (364), the court said, concerning the admissibility of evidence as to treatment of a prisoner while under arrest:

> "That he was ill-treated by being put, by the officer, in such place as described, denied food or the privilege of getting his witnesses, subject to oppressive conduct on the part of the magistrate, and fined, were none of them damages which necessarily accrued from the act of the defendant, nor were they damages implied by law; and to prevent surprise on the defendant, such of them as defendant could be held responsible for should have been stated in the declaration. But if the magistrate had jurisdiction, his act of fining plaintiff could not be a proper element of damages in the action for trespass, false imprisonment and assault and battery, though it might be in case for malicious prosecution, if stated in the delcaration."

There were many other improprieties in the manner in which the examination of witnesses was conducted, which probably will not occur upon the next trial.

In his closing argument defendant's attorney, in discussing the amount of possible damages, called attention to the fact that Kluessner, who was responsible for the arrest in the first instance, was not a party defendant. This remark was stricken out, with a rebuke of counsel by the court which could not have failed to harm him before the jury. We see no reason why counsel should not have been permitted to comment on this fact, especially in view of the argument of plaintiff's counsel, to the effect that it was only from the defendant, the Express Company, that plaintiff could get compensation.

One of the vital questions in the case was as to the authority of Kluessner and of a Mr. Haberton, who had charge of the stables, harness and wagons, to make an arrest, the defendant denying that they had such authority. In a number of instructions given by the court at the request of plaintiff, the arrest was referred to as made by "authorized agents." It was clearly prejudicial error for the court, by instructions, to assume or to imply that Kluessner and Haberton were "authorized agents" in making the arrest.

Other errors in the instructions have been brought to our attention which do not require comment, as doubtless they will be avoided on the next hearing.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

447-A - 19052

SEBASTINO LORENZO,
Appellant,

vs.

THOMAS F. HUNTER, Bailiff,
GATINA CANINO and TERESINA
CANINO,
Appellees.

185 I.A. 574

APPEAL FROM COUNTY COURT,
COOK COUNTY.

447-B - 19053

SEBASTINO LORENZO,
Appellant,

vs.

THOMAS F. HUNTER, Bailiff,
Appellee.

185 I.A. 574

APPEAL FROM COUNTY COURT,
COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

On November 11, 1911, Sebastino Lorenzo, plaintiff, sued out a writ of replevin against Thomas F. Hunter and others for the recovery of certain horses, harness and wagons. Subsequently, on December 27, 1911, the same plaintiff sued out another writ against "Thomas F. Hunter,- Bailiff of the Municipal Court" for the recovery of certain horses, harness and wagons. Some of the chattels apparently are described in both writs. The suits seem to have been heard at the same time, and a judgment was entered in each finding the right of possession in the "defendant" and assessing damages at one cent. Appeals from both judgments are before us and have been consolidated for hearing.

The first assignment of error is that the "judgment of the court is not responsive to the issues," but this point is not presented or argued in plaintiff's briefs. Assignments of error not argued are held to be waived. Central

Union Building Co. v. Rolander, 212 Ill. 27. However, inspection of the record shows that plaintiff claimed to be entitled to the possession of the goods, and defendant's pleas traversed this. Hence a finding that the right to possession is in the defendant may be said to be responsive to the issues.

The only other assignment of error is that "the court erred in assessing damages against the plaintiff." No reference whatever is made to this point in plaintiff's briefs. Therefore it does not require comment, but it may be noted that in replevin if the right of property is adjudged in the defendant, damages may be assessed against the plaintiff by the court. Sections 22 and 24, chapter 119, Hurd's Revised Statutes.

Defendant has asked that statutory damages for delay be assessed, and this we would be disposed to do if it could be done. Section 23, chapter 33, Hurd's Statutes, provides in such a case as this that the damages may be fixed "at a sum not exceeding ten percentum of the amount of the judgment." The trial court assessed the damages at one cent, and ten percentum of this is an amount too small to be considered.

The judgment is affirmed.

AFFIRMED.

118 - 10115

185 I.A. 575

ROBERT GORDON,
Plaintiff in Error,

vs.

WATSON SOLAR WINDOW COMPANY,
Defendant in Error.

Error to
Municipal Court
of Chicago.

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

An action was brought in the Municipal Court of Chicago by Robert Gordon, plaintiff in error, against the Watson Solar Window Company, defendant in error, to recover for labor and material expended and furnished in repairing a heating plant in the building occupied by it at No. 2500 South Paulina street, Chicago, at the request of defendant in error through its president. Defendant in error had judgment in the court below.

The labor and materials amounted to $346.64 according to the undisputed evidence. The controversy in the court below was upon the question of liability. In our opinion the defendant in error, upon the evidence, is liable for the work and materials furnished by the plaintiff in error.

The judgment is reversed and judgment is entered here in favor of Robert Gordon, plaintiff in error, against defendant in error, Watson Solar Window Company, for $346.64 on a finding of fact.

REVERSED AND
JUDGMENT HERE.

191 - 19195

185 I.A. 576

RICHARD C. STEUDLE, doing business as RICHARD C. STEUDLE & CO.,
Defendant in Error,

vs.

CHARLES MANTHIE and MRS. CHARLES MANTHIE,
Plaintiffs in Error.

Error to Municipal Court of Chicago.

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

An action was brought in the Municipal Court of Chicago by defendant in error, Richard C. Steudle, doing business as "Richard C. Steudle & Company," against plaintiffs in error, to recover the sum of $42.50, alleged to be due for work, labor and material furnished in and about the repair of an automobile owned by plaintiffs in error.

Plaintiffs in error filed an affidavit of merits, alleging that the defendant in error guaranteed all work done on the automobile for ninety days, and that the automobile would be put in proper running order; that the work was not properly done and the automobile had not been in good condition since the work was done.

By leave of court, plaintiffs in error filed a set-off against the defendant in error, amounting to $11.00, and defendant in error filed an affidavit of merits to the claim denying *in toto* that he owed the sum.

April 3, 1913, the cause came on for trial before one of the judges of the Municipal Court and the defendant in error and his attorney being absent and no one representing him being present, the cause was dismissed for want of prosecution and judgment was entered in favor of the plaintiffs in error for the costs by them expended therein.

Subsequently, on July 26, 1912, three months and twenty three days after the entry of the above mentioned order, on motion of defendant in error, the Municipal Court vacated and set aside the order of dismissal and judgment and reinstated the cause in the court. No petition or affidavits were filed by the defendant in error in support of his motion to vacate the order of dismissal and judgment, and no showing whatever was made by him upon which the trial court based its action in vacating the order of dismissal and judgment. In our opinion, the Municipal Court was without jurisdiction to vacate the order and reinstate the cause. Section 21, Paragraph 264, of the Municipal Court Act, provides for the only method of giving to the Municipal Court jurisdiction to vacate judgments or orders entered by the Municipal Court after thirty days have intervened after the entry of a judgment or final order. No petition was filed under the authority conferred by said section 21, and the order under review was entered without jurisdiction. The order is, therefore, erroneous and is reversed.

REVERSED.

208 - 19213

185 I.A. 577

JOHN F. REIF, doing business as
VORTEX BLOW PIPE COMPANY,
Defendant in Error,

vs.

COMMERCIAL CABINET COMPANY, a Corporation,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

An action in contract was brought by John F. Reif against the Commercial Cabinet Company, a corporation, to recover for work, labor and material claimed to have been furnished by the plaintiff to said company under a written contract, the claim including loss of profits alleged to have been sustained by the plaintiff by reason of the defendant's refusal to permit the completion of the work. The contract sued on was attached to the plaintiff's statement of claim, and was written on the letter-head of the commercial Cabinet Company, as follows:

"Vortex Blow Pipe Co.,
Chicago, Ills.

Gentlemen:

Please furnish us one (1) double 45" shavings exhaust fan of the New York Blower Company's make, f. o. b. cars Bucyrus Ohio, for the sum of $154.00. (O. K. - L. K.)

You also agree to furnish us material and labor to erect a blower system, with the material we now have on our premises for 60¢ per hour, for skillfully and mechanical labor. Material that may be needed to complete this system shall be furnished by you and paid for by us at the rate of 12¢ per lb. Additional material furnished shall be agreed and settled on before erection.

Yours truly,
Louis Kirmse.

Vortex Blow Pipe Co.,
By J. F. Reif."

The defense was that the contract was not the contract of the defendant corporation but the individual contract of Louis Kirmse, the affidavit of defense denying the execution of the contract under oath, and denying that any of the material was furnished to or work done for the Commercial Cabinet Company, and

alleging it was furnished to and done for Louis Kirmse, an individual.

The Municipal Court held that the use of the words "us" and "we" in the contract created such an ambiguity that parol evidence was admissible to show who the real parties to the contract were, and admitted evidence of the preliminary conversations prior to and contemporaneous with the execution of the contract. In thus holding that the contract was ambiguous and admitting evidence pf prior conversations, the court erred. Keeley Brewing Co. v. Decorating Co., 184 Ill. 580; Clark v. Mallory, 185 id. 337.

The rule as to the admission of parol evidence of prior conversations relates as well to the introduction of evidence for the purpose of showing who were the parties intended to be bound by a written instrument, as to the meaning or intention of the language used in the instrument, and where there is no indication upon the face of the contract that any other persons than those who signed it are intended, the court will not permit extraneous evidence to show that other and different parties were intended to be bound. Loeb v. Flannery, 142 Ill. App. 471; People v. Grissbach, 137 id. 462; Strauss v. Cohen Bros. Co., 169 id. 337.

The court permitted evidence of the subsequent acts of Louis Kirmse to show the construction placed upon the contract by the parties after its execution. This was error. Davis v. Sexton, 35 Ill. App. 407. When the contract is in writing, it is for the court to state its meaning, and it is only where there is a doubt as to the proper meaning of the contract, arising from the ambiguity of the words or phrases used, that the acts of the parties are looked to for aid in construction. People v. Murphy, 119 Ill. 159.

The evidence in question related to certain time slips which were made out by the plaintiff's employes who worked

upon installing the blower system, the time slips being signed "Commercial Cabinet Co. O. K. Louis Kirmse;" and also a statement of weights and material furnished by the plaintiff on the job in question, which statement was also signed with the name of Commercial Cabinet Company by Louis Kirmse. The evidence shows that Kirmse was the owner of the building; that the Commercial Cabinet Company was his tenant and occupied one floor of the building, and that the blower system was being installed for the benefit of all the tenants to take the shavings and sawdust away from the different floors of the building, if the several tenants saw fit to connect with it.

The court, after admitting parol evidence over the objections of the defendant, charged the jury that unless plaintiff had "established by a preponderance or greater weight of the evidence that at the time of the entering into of the contract in question, it was the mutual understanding of the parties that the corporation was to be bound thereby, then he cannot recover in this case. But you have a right in determining the intention of the parties, if it is not clear from the written instrument itself, to take into consideration the circumstances under which the contract was entered into, the conduct of the parties with respect thereto, and the way in which they treated it in the future. But, if from the writing itself, the intention is clear, then, of course, no regard should be had to any of those things. It is only where the contract is ambiguous, and you cannot determine from it who was intended to be bound, that you may take those other things into consideration." This portion of the court's charge was excepted to and it was erroneous. The court submitted to the jury the question whether or not the contract was ambiguous. That was a question of law which it was the duty of the court to decide. The charge, in effect, told the jury that the act of Kirmse, in

signing the name of the corporation to the time sheets and weight slips, was an act of the corporation. In this the charge was erroneous. It was the duty of the court to construe the contract from the language contained therein, and it was error to instruct the jury that they might construe it.

From an examination of the evidence, we think the verdict and judgment was clearly against the weight of the evidence. The evidence on behalf of the plaintiff wholly fails to make out his case against the defendant, plaintiff in error, and the court should have sustained the motion of the plaintiff in error to instruct the jury to find in its favor.

The judgment is reversed.

REVERSED.

221 - 19336

FERD KUHLEN,
Defendant in Error,

vs.

CHICAGO ATHLETIC ASSOCIATION,
a Corporation,
Plaintiff in Error.

185 I.A. 579

Error to
Municipal Court
of Chicago.

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

Ferd Kuhlen, defendant in error, sued the Chicago Athletic Association, plaintiff in error, in the Municipal Court of Chicago, to recover the sum of $65 as wages due the plaintiff from the defendant, and for $10 attorneys' fees. The court, upon the trial, entered judgment against the defendant, plaintiff in error.

The statement of claim alleges that the plaintiff had been employed by the defendant from month to month, and that the plaintiff was wrongfully discharged. The defendant's affidavit of merits admits that the plaintiff had been employed by the defendant up to and including the third day of October, 1913, but states that on the last mentioned date he was discharged for cause. The affidavit admits that there was due and owing to the plaintiff from defendant the sum of $6.30 as wages from the first day of October until the third day inclusive. The defendant's affidavit of merits further states that the plaintiff was discharged from its employ for failure, on numerous occasions, to obey instructions given by the manager of the bath department, for rough and discourteous handling of bath patrons, and for failure to take proper and sanitary care of the apparatus of the bath department, in leaving the steam room in an unsanitary condition, and that all the enumerated causes of discharge were in direct contravention and violation of the rules of defendant's bath de-

partment, which rules were well known to the plaintiff at the time of his entering upon the contract of employment with the defendant.

The errors relied upon are that the finding of facts by the court is contrary to the evidence and unsupported thereby, and that the court erred in admitting on the trial improper evidence on the part of the plaintiff and in refusing proper evidence offered by the defendant, and erred in refusing to grant a new trial and in entering judgment.

Upon a review of the evidence in the record, we are of the opinion that it shows that the plaintiff was discharged for good cause and that, therefore, the judgment is contrary to the evidence.

The plaintiff introduced in evidence a letter signed by C. J. Walsh, which was identified by Kuhlen, the plaintiff. The letter states that Kuhlen had been employed by the association as a rubber in its bath department for ten years and that during that time his services were satisfactory in every respect and that he was considered honest, industrious and reliable. The defendant called Walsh, who wrote the letter, and he testified that he had signed the letter and that he had given it to Kuhlen merely to help him get another job. The court, however, sustained objections to this testimony and ruled out all evidence on behalf of defendant showing under what circumstances and conditions the letter was written.

We are of the opinion that the letter was improperly admitted in evidence as an admission against the defendant; that, before it could be admitted, the agency of the person writing the letter should have first been established by affirmative evidence other than the declaration of the agent to that effect. Pease v. Trench, 197 Ill. 101; Callaghan v. Myers, 89 id. 566. Further-

more the declarations of an agent must be of his own knowledge as to matters of fact and not mere expressions of opinion. Teal v. Meravey, 12 Ill. App. 32. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

247 - 13753

AMOS H. CLARK, Appellee, vs. THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, a corporation, Appellant.	185 I.A. 580 Appeal from Municipal Court of Chicago.

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment recovered by Amos H. Clark, appellee, against the defendant below, the Pacific Mutual Life Insurance Company of California, in the Municipal Court of Chicago, on December 14, 1911, for the sum of $1200 and costs. It appears from the record that the plaintiff, Clark, took out an accident insurance policy in the defendant company, which insured him "against bodily injuries effected directly through external, violent and accidental means." The provisions of the insurance policy, under which the questions in the case arise, are as follows:

"The Pacific Mutual Life Insurance Company of California does hereby insure Amos H. Clark against bodily injuries effected directly through external, violent and accidental means * * * as specified in the following schedule and articles: * * * Section 'C' Weekly Indemnity Not Section 'D' to exceed 200 weeks.

$60 For loss of time per week $25

Article 1 refers to total losses (not in question).

Article 2. If loss of time results solely and exclusively from bodily injuries defined above, thereby causing immediate, continuous and total disability of the insured from the date of injury, but not resulting in any total loss, as set out in Article 1 and sections 'A' and 'B', the company will pay for the term of such total disability weekly indemnity in the amount set out in the schedule, section 'D.'

Article 3. And similarly, if continuously and immediately, from the date of bodily injuries defined above, or following total disability, the insured be necessarily disabled from performing one or more important daily duties pertaining to the occupation of the insured, the company will pay not less than 25, nor more than 80% of the weekly indemnity specified in section 'D' above. But in no event shall any weekly indemnity for any one cause of disability, total and partial, be paid for more than 200 consecutive weeks."

Plaintiff was a passenger train conductor employed by the Chicago & Great Western Railroad at the time he took out the policy of insurance with the defendant company. At the time of injury, which was on November 19, 1910, his position was that of train master. On the day last named, plaintiff was standing on a plow car and the train was backing up. The engineer applied the air brake in emergency and the plaintiff was thrown off the car and the plow car passed over him, injuring his back, spine, ribs, chest and groin. There were three small holes in the side of his head and one quite large one, and quite a hole in the left leg below the knee.

On February 10, 1911, the plaintiff furnished proofs of disability from November 19, 1910, to February 5, 1911, making 78 days or 11 weeks and 1 day, at $25 per week, making $278.57. The defendant deducted therefrom $35, being the premium then due on the policy for the ensuing year, leaving a balance of $243.57 due the plaintiff on February 5, 1911. This amount was paid on February 10, 1911. There were five days due the plaintiff on the 10th day of February when he was paid the above amount. The doctor's statement and the claim were filled out to the 5th of February, and Miller, the general agent of the defendant company, desired to change the amount so as to pay it up to the 15th, being the date on which Clark expected to try to work, but Clark would not consent to have the papers changed. He did not try to go to work until February 15th. When Clark made out his claim, he had not recovered from his injuries and knew positively that he was not well, but, on advice from one of the attending physicians, Dr. T. A. Davis, who was the railroad company's surgeon, and who recommended that he go to work, that he would recover faster, was willing to try to cure himself in that way if it could be done, but he was neither certain nor satisfied that going to work would cure him, and he was, therefore, not willing to release the de-

fendant company from further payments. In order to protect himself so that he might receive payments in case he was unable to continue to work, he wrote a letter and delivered it to the superintendent of the defendant company, together with his proofs of claims. He also had a talk with Miller, the general agent of the defendant, and said to Miller: "Yes, sir if I am not able to continue to work, I expect the Pacific Mutual Life Insurance Company to reimburse me for the time I have lost." Miller replied: "We pay all our claims and if a man is not able to do all his work we pay a partial disability."

Plaintiff Clark, in addition to writing out the letter and delivering it to McLain, superintendent of the defendant company, also stated to him at the time he handed him the letter the following: "I told him if I was not able to go to work, I expected the Pacific Mutual to pay me until I was, if I was not able to work." McLain replied: "Some thing, we pay all our claims." Clark further testified, "And then I put that in writing instead of telling him, because if I was not able to continue in the service, I expected to be paid by the Pacific Mutual."

Plaintiff Clark, with the understanding had with the general agent, Miller, and the superintendent, McLain, of the defendant company, that if he was unable to work he would be paid, started to work on the 15th of February, and with reference to his work, testified as follows:

> "Q. Mr. Clark, during the time you made these trips how did you feel?
> "A. I was very sore when I came in off the first trip and I thought it would be simply impossible for me to go out on the second one. I worked three trips and did not go out again because I was not physically able."

He thereupon wrote a letter to Miller, the general agent of the defendant, notifying the company that he was unable to continue to work, and received a letter, dated March 23, 1911, from the company in which they acknowledged his letter of March

16th, addressed to W. A. McLain, and then stated "you called at my office and made settlement of the claim for the injury you sustained, and I gave you my check in full settlement of this claim," and also a letter of April 8, 1911, acknowledging receipt of letters of recent date from Clark, and stating, "I understood that when I gave you your indemnity check that this was in full settlement of your claim, the check so stated this fact; and had you not wished to settle in full at that time, you should not have received our check. (Signed) Yours truly, W. A. Miller, General Agent."

The plaintiff afterwards called on McLain, the superintendent, who referred him to Mason, the general adjuster. He went to the office of the general adjuster and found that he was absent. He talked with the assistant about his claim and the assistant asked him to wait until the general adjuster, who was in the East at that time, got back. Clark afterwards called at different times but was unable to see him until after the holidays of 1911. In January, 1912, he saw the general adjuster who refused to do anything in regard to the claim, and thereupon this action was commenced. It is not successfully controverted in the record that the plaintiff, Clark, was seriously injured and that the injury caused a continuing disability to perform his work as train master or conductor of a train on a railroad during the period for which recovery is sought in this action, unless the fact that under the advice of the physicians he made three trips as conductor on the train in an effort to determine whether the recommendations or opinions of the physicians, that if he went to work he would recover faster, should prove true, may be considered an interruption of the continuous disability provided for in the policy. This question was submitted to the jury and was passed upon by them.

It is contended on behalf of appellant that under

the provisions of the policy for indemnity for continuous disability, the break or interruption of eight days, when the plaintiff worked at his usual occupation, destroyed the continuity of the disability and precludes recovery after February 5, 1911, when the disability ceased to be continuous.

Upon a review of the evidence upon that subject and of the authorities cited in the briefs, we are of the opinion that the continuous and total disability provided for in the contract was not interrupted or terminated by the break or interruption of eight days when the plaintiff tried to work at his usual occupation. The object to be accomplished by an agreement exerts a potent influence on the meaning to be attached to its several terms, because it is to be presumed, unless the contrary appears, that the parties intended every term of the contract to aid, not to frustrate, the attainment of the object for which the contract was made. While the language of the contract, or a particular clause of a contract, will not be wrested from its true meaning in order to make it consistent with other clauses, it will be given an interpretation consonant to the general intention of the agreement, and if a literal interpretation of a particular clause in the contract would defeat the intention, it will be given an interpretation in accordance with the general intention of the agreement. There can be no doubt as to the purpose for which the policy of insurance was taken by the plaintiff, and, presumably, issued by the defendant. It was to provide indemnity for the plaintiff if he should sustain loss of time in his business in consequence of an accidental injury. The agreement contemplated an indemnity to the plaintiff if by accidental injury his ability to earn money should be suspended, caused by a destruction or impairment of the plaintiff's power to earn money by his personal exertions. When, therefore, the income of an insured party ceases because of

the occurrence of a misfortune insured against, it must be held to be within the terms, purpose and intention of the policy when a reasonable construction is given to that document. Young v. Travelers Ins. Co., 80 Ms. 244; May on Insurance, Sec. 542; Hooper v. Accidental Death Ins. Co., 5 H. & N. 545 (affirmed in 6 H. & N. 839). In Monahan v. Supreme Lodge, etc., 86 Minn. 234, appears an interesting discussion of the construction to be given to a policy covering the question of disability to perform the ordinary duties of the insured in his business. See also Breil v. Claus Groth, Plattdutschen Verein, 120 N. W. Rep. 805; Thayer v. Standard Life and Accident Insurance Co., 69 N. H. 377; Pennington v. Pacific Mutual Life Ins. Co., 85 Ia. 468. In line with the holdings in other jurisdictions is Grand Lodge B. of L. F. v. Orrell, 238 Ill. 208.

In our opinion the jury was warranted in finding that the disability of the plaintiff was continuous after February 5, 1911, from the evidence presented to it. The mere effort to perform his usual duties cannot be reasonably interpreted under the facts and circumstances of the case to be either a consent on the part of the plaintiff that if he was not able to continue in the work, the payment which he received on February 10th should be in full of all claims and demands under the policy in question, or that the officers of the defendant company were authorized to treat it as a termination of the disability occasioned by the injuries which Clark had received. The conversations between Clark and McLain and Miller were rightfully interpreted by the jury as not precluding Clark from the recovery for continuing disability thereafter.

The receiving of the $272.57, which was due him under the policy on February 5, 1911, was in no sense a settlement of the controverted claim, and his signing of the receipt endorsed

on the back of the check did not have the effect in law of acknowledging full satisfaction and final settlement of all claims accrued or to accrue under the policy.

The court did not err in receiving evidence of conversations between the plaintiff Clark and Miller and Clark and McLain prior to or at the time of the delivery of the check to Clark. The terms of the receipt on the back of the check were subject to contradiction and explanation like those of any other receipt.

It is next urged that the action is barred by the limitation contained in the policy, which provides that no legal proceedings shall be brought for recovery under the policy unless brought within three months after the receipt of proofs of disability at the office of the company at Los Angeles, California, nor at all, unless begun within six months from the date of filing such proofs. Slight evidence is sufficient to establish the waiver of such a condition in a policy. North American Accident Insurance Co. v. Williamson, 118 Ill. App. 670; Turner v. Fidelity & Casualty Co., 112 Mich. 425. As said in Bonenfant v. Insurance Co., 78 Mich. 653:

> "Forfeiture is not favored either in law or equity, and a provision for it in a contract will be strictly construed; and courts will find a waiver of it upon slight evidence when the equity of the claim is, under the contract, in favor of the assured."

Clark's evidence stands undisputed that he was requested to wait and see the general adjuster, and that he continued to go to see the general adjuster, but was unable to see him until after the limitation period for bringing the suit under the policy had expired. We do not think that the defendant company, thus dealing with the plaintiff Clark with reference to the adjustment of the claims which he was making under the policy, and having made it impossible for him to see the general adjuster, who he was

directed to see, until after the limitation period of bringing suit had expired, can now contend that the suit was brought too late.

Upon a review of the evidence in the record, we find no reversible error. The judgment is affirmed.

AFFIRMED.

March term, [illegible] A.D.

260 - 19266

185 I.A. 582

WILHELM E. KRIEGER,
Appellee,

vs.

CHICAGO CARTON COMPANY,
a corporation,
Appellant.

Appeal from
County Court,
Cook County.

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment recovered by appellee, Wilhelm E. Krieger, against the Chicago Carton Company in the County Court of Cook County.

In September, 1911, appellee Krieger, a physician and surgeon, owned and conducted what was known as the West Side Emergency Hospital in the city of Chicago. Appellant company owned and operated a factory in Chicago, one R. R. Richardson being its president, and F. R. Kuhlman its superintendent. September 13, 1911, a man named William Ulm, who was employed by and was working for appellant in its factory, received a severe injury to his left arm while so employed. Soon after receiving the injury, Ulm was taken to Kuhlman's office and Dr. LeBeau and an ambulance were telephoned for. When the ambulance arrived at the factory, both Richardson, the president, and Kuhlman, the superintendent, were present in the office where the injured man was, and by direction of Richardson and Kuhlman, Dr. LeBeau took Ulm to the West Side Emergency Hospital in the ambulance. Dr. LeBeau entered the ambulance with Ulm, took him to the hospital, and informed Dr. Krieger that he had been sent here with Ulm to have him treated. Appellee Dr. Krieger dressed the wounds, performed a difficult surgical operation the following day, and, after about five days, Ulm was removed from the hospital to his home where, or

at his office, Dr. Krieger continued to dress his wounds and treat him about four times a week for three months or more. During the time that Ulm was at home under treatment by appellee, Kuhlman visited Ulm's home and there had a conversation with Ulm in regard to the bill of appellee. After Ulm returned to work for appellant company, he had a conversation with Kuhlman, the superintendent, concerning the doctor's bill, and Kuhlman sent him to Richardson, who, in turn, sent Ulm to appellee Krieger with instructions to tell Dr. Krieger that his bill was too high and to induce him to reduce the amount thereof. Ulm obeyed Richardson's instructions. Appellee Krieger afterwards brought this action for his services in treating Ulm, which resulted in a verdict and judgment for $500 in favor of Krieger against appellant company.

It is urged as ground for reversal that the court erred in admitting evidence offered on behalf of plaintiff as to the value of his services, and also in refusing certain instructions requested by the defendant at the trial. The testimony objected to was given in response to questions calling for an opinion of a fair and reasonable charge for the operation performed by the plaintiff Krieger in setting the arm and bones of the forearm and the dressing, and setting the collar bone of the patient Ulm. The testimony of Dr. Krieger and Dr. Montgomery, a physician and surgeon, was relied upon by the plaintiff to prove the value of the services. The testimony of Dr. Montgomery was also as to the fair, reasonable charge in Chicago for services rendered by Krieger. It is now objected that the testimony should have been directed to what was the customary and ordinary fee charged by physicians in Chicago for services of like character. Objections were made to the questions asked of the witnesses above named, but the objections were general and did not specify the defect now relied upon. It is undoubtedly the law that the charge should be based upon the

usual, customary and ordinary fee charged by physicians. In order, however, to raise the point for review, the objections should have pointed out the particular defect in the question so that it might be remedied on the trial. Counsel may not make general objections to evidence and then rely upon special objections on appeal. Chicago City Railway Co. v. Foster, 226 Ill. 288; C. & E. R. R. Co. v. Holland, 132 id. 388.

It is also urged that the court erred in refusing instructions requested by the defendant to the effect that the jury must disregard the whole of the testimony of Dr. Krieger and Dr. Montgomery relative to the value of the services inasmuch as it appeared from their testimony that it was not based upon charges customarily and ordinarily made by other surgeons in the vicinity. The court did not err in refusing these instructions for two reasons,- the first is that the court did give, at the request of the defendant, an instruction directing the jury to disregard any evidence which was not based upon the customary charges of surgeons at the time the services were rendered and in the vicinity; a second reason is that a party may not lie by and fail to make the proper objections to evidence, and then have the jury instructed that they are to disregard the evidence so improperly admitted without specific objection. If proper objections had been made, the proper questions might have been put to the witnesses and their answers taken; but, failing to make the proper objections, the defendant has no right to have the testimony excluded from the consideration of the jury by instructions when it was beyond the power of the plaintiff to remedy the defect pointed out in the instructions.

On the question of liability of the appellant company for the services rendered to Ulm, after a full and careful consideration of the evidence, we have reached the conclusion that

the defendant, appellant, is liable upon an implied contract to pay for the services which it, through Dr. LeBeau, requested the plaintiff to render. There is no controversy in the evidence. There is no doubt that Ulm was sent to the plaintiff by the officers of the appellant company; that the officers of the appellant company knew that appellee was rendering the services sued for; and that appellee expected to be paid for his services. There is no question in the evidence but that the injuries of Ulm were very serious and that the operation upon Ulm and his treatment, both before and after the operation, was skilfully performed, and that they were performed at the instance and request of the appellant. We think the jury had before it in the evidence and facts proven a fair basis to find that the appellant company was liable to appellee for the services rendered.

While it is true that the court erred in admitting evidence of a conversation, which was not communicated to the plaintiff, between Ulm and Kuhlman while the latter was at Ulm's house, in substance that Ulm asked him about the doctor's bill, and that Kuhlman replied to Ulm that he was not to bother his head about that; that we , (meaning the appellant company) will attend to that part of it, we do not regard the improper admission of this evidence as reversible error. The judgment is affirmed.

AFFIRMED.

180 - 19181

R. B. FARSON,
Defendant in Error,

vs.

CURTIS B. CAMP,
Plaintiff in Error.

185 I.A. 588

Error to
Municipal Court
of Chicago.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This suit was brought on a promissory note for $250 by Farson, the payee, against Camp, the maker. The only question presented is whether or not the latter's affidavit of merits, stricken from the files for insufficiency, presented a legal defense. It is too long to be set forth in haec verba in this opinion. The defense therein set up is in substance,- that Farson and Camp jointly guaranteed the payment of a certain note for $400 with the understanding that Farson was to get a third party to join in the guaranty; that Farson forged the name of the third party to the guaranty, and afterwards paid the note; that Camp, ignorant of the forgery, and supposing he had the right of contribution from a third guarantor, by way of adjustment of his liability to Farson for paying said note guaranteed the payment of another note subsequently given to Farson by the same maker for the same amount; that Camp paid Farson $150 and claimed to owe him only $50 more on the transaction, making in all one-half of the original sum paid by Farson on their joint guaranty.

It does not clearly appear from the affidavit of merits why the note sued on was executed, but enough appears to justify the conclusion that it was given for the balance due on the note to Farson for $400 after Camp paid $150. From the facts thus set forth there would appear to be no liability from Camp to

Farson except for what the latter could require of Camp by way of contribution for satisfying their joint guaranty. As to what that sum should be, if anything, there should have been a hearing on the merits, and the court erred in denying it.

REVERSED AND REMANDED.

223 - .9x68

CITY OF CHICAGO,
Plaintiff in Error,

vs.

THOMAS D. McGUIRE,
Defendant in Error.

185 I.A. 589

Error to
Municipal Court
of Chicago.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The record for review is that of an action brought for the alleged violation of a city ordinance, the first section of which reads as follows:

"Section 1. That no person, firm or corporation owning, in charge of or in control of any public lavatory or washroom shall maintain in or about such lavatory or washroom any towel for common use.

The term 'common use' as used in this ordinance shall be construed to mean for use by more than one person."

Section 2 provides for a fine for its violation.

The case was heard without a jury on stipulated facts. The material facts are: that defendant in error (defendant below) owns, maintains, operates and has under his control a lodging house in the city of Chicago, on the third, fourth and fifth floors of which he maintains roller towels for the use of men guests, and refused and failed to discontinue their use during a certain period while the ordinance was in effect; that on each floor are one hundred compartments, in use more or less, and a lavatory or washroom to which only those have access who have registered and paid their bills; that any man applying for lodging and paying therefor will be accommodated if not intoxicated or apparently afflicted with disease, the judge of these matters being an "experienced" clerk, not a physician, that no more than 70 per cent. of the guests are present at one time as some work nights and others in the daytime.

It being a lodging house to which anyone seeking lodgings of that character is invited, and the lavatory or washrooms being for the use of all guests on the same floor, the maintenance of a roller towel for their common use comes plainly within the intent of the ordinance, the manifest purpose of which is to prevent transmission of infectious diseases that may result from common use of the same towel.

The only question is whether such lavatory or washroom may be deemed public. Certain other facts stipulated to are relied on by defendant to negative the contention that it is. We do not think they affect the question. They are, in substance, that in other respects defendant maintains a house, administered under the requirements of the health ordinances; that on the second floor there is a lavatory open for and used by the public without charge therefor, over the door of which is the word 'Public', and in which no towel is kept for common use; that each floor is accessible only through one door near the clerk's office; that over the doors of the lavatories used by the guests are the words "Private. Only for guests of the house;" that defendant furnishes for each hour, for a certain number of hours, five to seven roller towels on each floor, sufficient to allow each guest an amount of toweling equal to about three feet per day, which, nevertheless, is subject to common use.

None of these matters alters the fact that the roller towels were for the common use of all guests on the same floor, and that the accomodations were open to the public with only such restrictions as are generally applicable to hotels, inns and other similar public places. It was said in Shaw v. Carpenter, 54 Vt. 155, 161, that whether a place is a place of public resort must depend upon the evidence which gives character to the place; and in Parker v. State, 26 Tex. 304, that "a public place does not mean

a place devoted solely to the uses of the public, but it means a place, which is in point of fact, public as distinguished from private, a place that is visited by many persons, and usually accessible to the neighboring public." In defining a public place, such as would render a nuisance therein a public nuisance, it is said to be a place "where members of the public are likely to come within the range of its influence." (16 Am. & Eng. Ency. of Law, 928). Interpreted in this relative sense, we think the term public is properly applicable to a lodging house conducted in the manner above stated and a lavatory maintained therein.

The court, therefore, erred in holding on the facts stated that it was not a public lavatory and in entering judgment for defendant.

REVERSED AND REMANDED.

284 - 19290

GEORGE G. PLACE, Appellee,	)	185 I A 501
vs.	)	Appeal from Circuit Court, Cook County.
CHARLES T. GILMORE, Appellant.	)	

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was a suit to recover commissions which plaintiff Place contended defendant Gilmore orally agreed to pay for his procuring a purchaser ready, willing and able to pay a price agreed upon between said purchaser and Gilmore, for the business, good will, etc., of the Chicago Addition Mangle Company, a corporation of which said Gilmore was vice president and largest stockholder.

The suit was brought against the company and Gilmore jointly, but was dismissed as to the company at the close of the evidence and then submitted to the jury on an amended count claiming a contract for commissions, as aforesaid, with Gilmore.

What the contract was and with whom made we do not deem it necessary to consider; for, assuming that Gilmore entered into an agreement with plaintiff binding him personally if a purchaser was procured in accordance with its terms, there could be no recovery on this record. The purchase price was to be $50,000. There is no pretense that Place found a purchaser at that price, but it appears that he brought together Gilmore and one Charles H. Wilcox, and an offer of some kind was made by Wilcox to Gilmore as to the terms of which they differed in their testimony.

Wilcox testified that at a personal interview at which he and one Goodrich, since deceased, were present, "Goodrich said he would pay $27,500 for the business and would draw the papers. * * * Mr. Gilmore said he would have the papers drawn up by his lawyer, and when the lawyer drew the papers he would come over and see me and have it fixed up, and that was the last time I saw him." This is literally and substantially plaintiff's entire proof of an offer and acceptance. It can hardly be deemed sufficient proof of acceptance, and that it should not be given such an interpretation is confirmed by the subsequent conduct of the parties, for it was not treated as such before suit was commenced, either by Place, Wilcox or Goodrich. Contrary to what might reasonably have been expected if any such offer was made and accepted, nothing more was done about it afterwards. No proof of a demand or refusal to carry out such an understanding was made, and no claim to commissions was asserted before the suit was brought, which was after the lapse of two years.

This testimony is subject to the further criticism that while it related to an oral acceptance of an oral offer, yet on cross-examination, Wilcox admitted that his proposition was submitted in writing, and though it had been destroyed, counsel for Place objected to his own witness, Wilcox, giving its contents. Gilmore, however, did testify thereto and said that it was in the form of a letter addressed to said Mangle Company, submitting a proposition by Wilcox and Goodrich to form a company, to put in escrow $10,000, to permit them to operate the business for thirty days, and if at the expiration of that time they were satisfied with Gilmore's representations as to the profits of the business, they would then pay over the money in escrow and $40,000 of stock in the new company. While Wilcox

denied that those were the terms of the offer, he did not state what the written offer was. Place was, therefore, bound to prove acceptance of a written offer to warrant recovery, for his only witness thereto admits it was in that form. Gilmore, however, swore the written offer was refused, that Place was so informed and that no other offer of any kind was ever made, and that the first time he ever heard of the claim for commissions based thereon was at the trial of the case.

The question is discussed whether or not the contract with plaintiff was made by Gilmore in his personal capacity or as agent of the company. Whichever view may be taken of the matter, it is sure that on March 30, 1907, a letter was sent to Place, signed in the company's name by Gilmore, vice president, notifying him as follows: "Any and all deals and propositions of all sales for the Chicago Addition Mangle Company given you in any way, shape or form, written or verbal, are off. * * * The writer's object in giving you a thirty day sale option last August was to retire from the business, and not because the business was not profitable. * * *"

Surely, after receiving a notice of this kind, Place was in no position to claim commissions, either against the company or Gilmore except upon a new contract made after that time. The offer of Wilcox, whatever it was, was subsequent to that time, but there is no pretense that there was a new arrangement with Gilmore after the receipt of said letter, except that Place testified that Gilmore stated to him, after an interview with Wilcox, that he had decided to accept Wilcox's offer of $37,500 and, though less than what he wanted, he would pay a commission of ten per cent. But, in the absence of competent proof of an acceptance of any kind of an offer, verbal or written, this testimony, contradicted by Gilmore, has little

significance. Not only is there a great preponderance of evidence against plaintiff's contention, but in the absence of competent proof of acceptance the court should have directed a verdict for defendant Elmore on his motion therefor at the close of the case. The judgment will be reversed.

REVERSED.

288 - 19395

CHARLES S. QUINLAN and HOWELL N. TYSON, co-partners doing bus. as QUINLAN & TYSON,

Appellees,

vs.

MARY E. TOWLE,

Appellant.

185 I.A. 592

Appeal from County Court, Cook County

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was a suit by real estate brokers to recover commissions and certain expenses incurred in the alleged agency. The claim for commissions is based upon the contention that appellees procured for appellant a purchaser for real estate she agreed to sell, and that she failed to carry out her contract.

The title to the property became vested in four heirs of Mrs. E. J. Towle, deceased, of whom appellant was one, each having an undivided one-fourth interest therein. At the time of the transaction in question, one of them had died and her title was vested in her minor children subject to her husband's dower rights. One Miss Bartelme was the guardian of said children. Appellant had power of attorney for the management of the property, but not for its sale. Appellees were her renting agents. One Mrs. Anderson, going to appellant to rent the property, learned that she wanted to sell, and was referred by appellant to Mr. Pearson, appellees' manager, as her agent, who took up and carried on negotiations resulting in a contract for the sale of the property, drawn by Pearson and signed by appellant and Mr. and Mrs. Anderson. Underneath appellant's signature were the words, "Attorney in fact for the estate of Mrs. E. J. Towle, Dec'd." Appellant and Pearson differ in their testimony as to whether such designation was added to her signature at his suggestion.

In the view we take of the matter it is immaterial, for Pearson knew the condition of the title. He not only knew of the minors' interests, but before the contract was signed, consulted Miss Bartelme, as the minors' guardian, at appellant's request, and learned from her, if he was not otherwise chargeable with such knowledge, that a disposition of the minors' interests required court proceedings and a public sale. He knew, therefore, that appellant could not exercise authority over the minors' interests, and give the title which, by the terms of the contract subsequently drawn by him as appellant's agent, she agreed to convey. He knew it was useless to procure a purchaser unless the title of the minor heirs, over which appellant had no control, could be secured through the agency of their guardian and the court. With such knowledge, appellees, through Pearson, must be held to have undertaken to procure a purchaser on the understanding that the minors' title would be thus obtained.

It does not appear that appellant ever claimed to have power of attorney to sell or convey the interests of any of the heirs. With knowledge of their interests and that appellant had only an undivided interest in the property, Pearson had no right, in the absence of any express claim to that effect, to assume that she had power to convey their interests. He manifestly proceeded in the negotiations, not upon the assertion of any such claim, but upon the contingency of her ability to acquire leave to sell the minors' interests and to obtain a conveyance from the other tenants in common.

Cases cited by appellees to the effect that one contracting to sell real estate he does not own may become liable for commissions for procuring a purchaser, are distinguishable from a case like this, where the broker assists his principal in making a contract which he knows his principal has no power to carry out.

After the contract was entered into, which required appellant to furnish an abstract or a guaranty policy, Pearson, in pursuance of directions given by Miss Bartelme as appellant's attorney, ordered a guaranty policy from the Chicago Title & Trust Company, for which, at the time negotiations ceased, a bill for $40 was incurred and paid by appellees. The judgment appealed from was for $275, including said $40 and a claim for $235 as commissions. Upon this record, no recovery could be had for more than $40. The judgment, therefore, will be reversed and the cause remanded, unless appellees, within ten days herefrom, file a remittitur of $235, in which case the judgment will be affirmed with costs.

AFFIRMED ON REMITTITUR.

March Term, 1[illegible]

322 - 12335

BERTHA ROHN,
Appellee,
vs.
ROBERT F. ROHN,
Appellant.

Appeal from
Circuit Court,
Cook County.

185 I.A. 594

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from an order for temporary alimony and solicitor's fees based upon the pleadings and testimony of the defendant. The oral evidence is not preserved in the record. On that ground it is urged that the record does not make a sufficient showing to authorize the order. We think the order was justified without any testimony. From defendant's answer it appears that he owned a lot worth $200 and received $500 a year to attend to his mother's investments. It does not appear that it took all his time or that he had any one but his wife to support. An allowance of alimony at the rate of $5 per week might reasonably be based on one's ordinary earning capacity, where, as in this case, he has only a wife to support. He was not even required to pay that until one week after the entry of the order and was given thirty days in which to pay the solicitor's fees of $25. Presumably, the court would not undertake to enforce such order if it subsequently appeared that defendant was unable to meet the payments at the time required. We think the answer alone authorized the entry of the order.

It also appears from the record that a final decree has been entered, reserving to the court for future consideration the question of alimony and solicitor's fees. These matters, therefore, must necessarily become a subject for reconsideration by the court, so that the question before us is largely a moot one.

The order is affirmed.

AFFIRMED.

March Term, 1913.

325 - 19338

BERTHA BOHN,
Appellee,
vs.
ROBERT F. BOHN,
Appellant.

185 I.A. 595

Appeal from
Circuit Court,
Cook County.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order for temporary alimony and solicitor's fees pending an appeal from a previous order entered October 15, 1912. The latter appeal was prayed November 11, 1912, and the order in question was entered November 29, 1912, for the same amount of alimony per week, namely, $5, and $25 solicitor's fees, the first payment of alimony to be made December 2nd and solicitor's fees within ten days. On December 12th contempt proceedings were begun for failure to pay the same, and this appeal was prayed. It is enough to say, without reviewing in detail the petition and answer thereto on which the order was based, that it appeared therefrom that plaintiff had no one to support but himself and wife, that he had a lot worth $200, and was receiving $500 a year for attending to his mother's investments. It did not appear that such duties took all his time. Almost the slightest earning capacity might be relied upon to support such order, unless it was shown that he could not get other employment.

It also appears from the record that a final decree has been entered, reserving to the court for future consideration the question of alimony and solicitor's fees. These matters, therefore, must necessarily become the subject of further consideration by the court, so that the question before us is largely a moot one.

The order is affirmed.

AFFIRMED.

168 - 18189

ALFONSO G. MAHONY, Plaintiff in Error, vs. CHARLES F. VAN WINKLE and INTER-OCEAN NEWSPAPER COMPANY, (a corp.), Defendants in Error.	)	**185 I.A. 609** Error to Circuit Court, Cook County.

Statement of Facts by the Court.

Suit was brought for libel by the plaintiff in error against the defendants in error. A demurrer to the original declaration was sustained. Thereafter an amended declaration was filed, the first count of which is substantially the same as the original declaration, which was in one count. The amended declaration was filed after the statute of limitations had run. Demurrers were filed to the first count and pleas of the statute of limitations to the second. Demurrers to the first count of the declaration were sustained, and demurrers filed by the plaintiff in error to the pleas of the statute of limitations as to the second count were overruled. The first count of the amended declaration is as follows:

"For that whereas the plaintiff before and at the time of the committing by the defendants of the several grievances hereinafter mentioned, was a person of good name, credit and reputation, and deservedly enjoyed the esteem and good opinion of his neighbors and other worthy citizens of this state. Yet the defendants, well knowing the premises, but wickedly and maliciously intending to injure the plaintiff, and to bring him into public scandal and disgrace, on to-wit the 24th day of June, A. D. 1910, in the City of Chicago, County of Cook and State of Illinois, wickedly and maliciously did compose and publish, and cause to be composed and published, of and concerning the plaintiff, in a certain newspaper called The Inter Ocean, whereof the defendant, The Inter Ocean Newspaper Company, was then and there the proprietor, a certain false, scandalous, malicious and defamatory libel, containing (among other things) the false, scandalous, malicious, defamatory and libelous matters following, of and concerning the plaintiff,

thatis to say: 'Building inspector (meaning the plaintiff) accused of asking payment of a bribe. Charles F. Van Winkle, south side property owner, makes affidavit that A. G.Mahony (meaning the plaintiff) demanded $50 from him (meaning the said Van Winkle) 'to fix things' (meaning and intending that plaintiff demanded a bribe to violate his duties as such building inspector). The Merriam Commission yesterday secured an affidavit and other information on which it began an investigation of a charge that Chief Building Inspector A. G. Mahony (meaning the plaintiff) had solicited a bribe of $50 from Charles F. Van Winkle, a retired capitalist and property owner (meaning the defendant Van Winkle), living at 3716 Forest avenue. If the charges made in the affidavit are sustained the Merriam Commission is expected to unearth one of the most gigantic systems of organized graft (meaning and intending that an organized system of blackmail existed) that has come to light since the investigation of the Cummings Foundry and 'shale rock steal.' The information in the hands of the Merriam Commission tends to show that employes of the building department (of which the plaintiff was one) with the assistance of friends on the outside and the active help of the police (meaning the police of said City of Chicago or the members of its said police force) are holding up builders and contractors at will and fleecing them of thousands of dollars (meaning and intending that builders and contractors were being blackmailed out of thousands of dollars). That such an organized system exists apparently is shown in the numerous complaints of contractors which have reached the Merriam Commission since it began to pry into the affairs of the building department. Throughout the south side of the city particularly, it is said that hundreds of building operations have been blocked by the refusal of contractors to 'square things' with the building inspectors. Mr. Van Winkle's affidavit set forth in brief that he (meaning the said Van Winkle) was first approached by a stranger when he was superintending the remodeling of a house at 3427 Vernon avenue. This stranger he (meaning the said Van Winkle) calls an 'educator.' The stranger told him his (meaning the said Van Winkle) work would be stopped in spite of the permit which he (meaning the said Van Winkle) held unless he (meaning the said Van Winkle) 'squared' things with the inspectors. Within an hour after this visit, Mr. Van Winkle says, he (meaning the said Van Winkle) was visited by Inspector Thomas Peel who pointed out many flaws in his (meaning the said Van Winkle's) structure and told him he (meaning the said Van Winkle) would have to stop the work. On the day following this visit (meaning the visit of Mr. Peel,) Mr. Van Winkle says, Chief Inspector Mahony (meaning the plaintiff) openly solicited a bribe of $50 as the price of allowing the work to continue. Van Winkle (meaning the defendant) failed to 'cough up' and went to the office of the building commissioner and secured the necessary permits to continue his (meaning the said Van Winkle's) work. While there he (meaning the said Van Winkle) was threatened by Mahony (meaning the plaintiff), he (meaning the said Van Winkle) says when he (meaning the said Van Winkle) again attempted to continue the work under the permits for which he (meaning the said Van Winkle) had paid and which had been approved he (meaning the said Van Winkle) was arrested and lodged in the Stanton Avenue Police Station. When Mr. Van Winkle (meaning the de-

fendant) was asked yesterday why he (meaning the said Van Winkle) had not taken the charge against Mahony (meaning the plaintiff) to the State's Attorney he (meaning the said Van Winkle) answered by a broad and significant smile. When seen at his (meaning the said Van Winkle's) house and asked about the information in the hands of the Merrian Commission Mr. Van Winkle (meaning the defendant) issued the following statement: 'I have been retired from active business for fifteen or more years and am devoting my (meaning the said Van Winkle's) energies to caring for my (meaning the said Van Winkle's) investments. I (meaning the said Van Winkle) have my (meaning the said Van Winkle's) money in real estate, chiefly on the south side. I (meaning the said Van Winkle) have repeatedly been annoyed by the methods of the city's building department, and the thing reached a climax the other day when some workmen employed by me (meaning the said Van Winkle) were converting a residence at 3427 Vernon avenue into a flat building.

"' I (meaning the said Van Winkle) had secured a permit to reconstruct the rear of the building and put on a back porch. This also called for interior alterations. As any one in the real estate business knows, as soon as you secure a permit the City Hall bunch become aware of what you are doing and it lays you open to all their petty graiting games.

"'Approached by an "educator."

"'On March 29, this year, I (meaning the said Van Winkle) was sitting at the rear of the house dressed in workman's clothes and watching the work on the house as I (meaning the said Van Winkle) usually do, when a stranger came around the back way, and, after asking who I (meaning the said Van Winkle) was and commenting on the work, said: "Well, you'd (meaning the said Van Winkle) better square things with the inspectors if you expect to do any remodeling." He (meaning the said stranger) said it would cost about $25 to 'square things.' I (meaning the said Van Winkle) told him (meaning the said stranger) that I had already secured a permit and ought to be able to go ahead. He (meaning the said stranger) just laughed and left me (meaning the said Van Winkle.)

"'About thirty minutes later Inspector Thomas Peel came around back of the house. 'Where are your (meaning the said Van Winkle's) plans for this work?' he (meaning the said Peel) demanded. I (meaning the said Van Winkle) told him (meaning the said Peel) that I (meaning the said Van Winkle) did not have any plans and that I (meaning the said Van Winkle) did not need them, as I (meaning the said Van Winkle) was nearly through with the work. He (meaning the said Peel) said he (meaning the said Peel) would stop the work unless I (meaning the said Van Winkle) got the plans. He (meaning the said Peel) said also that I (meaning the said Van Winkle) would have to build a brick fire wall down the middle of the house. I (meaning the said Van Winkle) told him (the said Peel) this would spoil the property. The building ordinance doesn't require any such thing for a two story brick building. My (meaning the said Van Winkle's) building already has a fire wall running across it. Peel threatened to stop the work, and this made me (meaning the said Van Winkle) sore, so I (meaning the said Van Winkle) said:

"'"Well, go ahead, you (meaning the said Peel) won't get anything out of me."

"'He (meaning the said Peel) left immediately and didn't say a word. But the next morning at 11 o'clock a person,

when I (meaning the said Van Winkle) afterwards found was Chief Inspector A. C. Mahony (meaning the plaintiff) came around to the back of the house. He (meaning the plaintiff) took a look around and said that the work must stop unless I (meaning the said Van Winkle) got a set of approved plans and agreed to put in a brick fire wall down the middle of the building.

"'Could fix it for $50.

"'Mahony (meaning the plaintiff) said I (meaning the said Van Winkle) had bawled out his deputy (meaning the said Peel) and seemed to be sore about it. I (meaning the said Van Winkle) told him (meaning the plaintiff) that a fire wall of the kind he (meaning the plaintiff) described would cost $800 or $700 and would ruin the property besides. After I (meaning the said Van Winkle) had argued the question with him (meaning the plaintiff) for a while he (meaning the plaintiff) said:

"'"Oh, you can fix it up for $50," and intimated that I (meaning the said Van Winkle) didn't need to put the wall in if I (meaning the said Van Winkle) 'fixed it up.' I (meaning the said Van Winkle) was so sore that I (meaning the said Van Winkle) just looked at him (meaning the said plaintiff) with my mouth open for a few minutes and he (meaning the said plaintiff) hurried away. He (meaning the said plaintiff) looked like he (meaning the said plaintiff) was afraid I (meaning the said Van Winkle)was going to hit him (meaning the said plaintiff). That same afternoon Policeman Hinkle of the Stanton Avenue Station came around behind the house where the workmen were.

"'"I've got orders to stop this work," he (meaning the said policeman) said. I (meaning the said Van Winkle) asked him (meaning the said policeman) where he (meaning the said policeman) got his (meaning the said policeman's) orders and he (meaning the said policeman) said over the telephone from the city building department. He (meaning the said policeman)stopped the work.

"'About two days later I (meaning the said Van Winkle) had a set of plans drawn up and took them up to the building department for approval. The approval of the plans and the fees for the permits cost me (meaning the said Van Winkle) about $11 in full. After I (meaning the said Van Winkle) got the plans approved Mahony (meaning the plaintiff), who was in the office at the time, leaned over and said to me (meaning the said Van Winkle):

"'" I'll never let you (meaning the said Van Winkle) finish your (meaning the said Van Winkle's) _____ building. If you (meaning the said Van Winkle) don't like that just go in and see the commissioner. "

"'So I (meaning the said Van Winkle) went to see Murdoch Campbell, the building commissioner, and Mahony (meaning the plaintiff) followed me (meaning the said Van Winkle) into his (meaning the said Campbell's) private office. Mahony (meaning the plaintiff, told Campbell that he (meaning the plaintiff) wasn't going to allow me (meaning the said Van Winkle) to finish the building. I (meaning the said Van Winkle) showed Campbell that the plans had been approved and said that if I (meaning the said Van Winkle) was not going to be allowed to finish my (meaning the said Van Winkle's) building on those plans which his office had approved then I (meaning the said Van Winkle) ought to have my (meaning the said Van Winkle's) money for the fees returned. He (meaning the said Campbell)

refused to return the money after Mahony (meaning the plaintiff) and other members of the office force there had told him (meaning the said Campbell) to.

"'Well, I (meaning the said Van Winkle) came back home and ordered my (meaning the said VanWinkle's) workmen to go ahead with the work on the plans which the building department approved. The work continued for about thirty days.

"'On June 2 a policeman from the Stanton Avenue Station ordered the work stopped. He (meaning the said policeman) threatened to arrest any one of the workmen who kept at it, but told them (meaning the said workmen) that I (meaning the said Van Winkle) was the fellow he (the said Policeman) wanted to get. The policeman left and the workmen went inside and continued their work. When I (meaning the said Van Winkle) came around on June 3 to see how they (meaning the said workmen) were getting along Policeman James Cooley of the Stanton Avenue Station came in and arrested us (meaning the said workmen and said Van Winkle). He took us (meaning the said workmen and said VanWinkle) over to the station and kept us there for fifty minutes. Cooley refused to allow us to use the telephone, but after a time I (meaning the said Van Winkle) talked over the wire to a friend. The sergeant gave his permission. Then we (meaning the said workman and said Van Winkle) were released.

"'Work on the building has been stopped now ever since, and the property is empty. I (meaning the said Van Winkle) estimate that I (meaning the said Van Winkle) have lost $500 by this trickery and crookedness of the building inspectors.'

"Mr. Van Winkle (meaning the defendant) said that when he (meaning the said Van Winkle) went to the office of the building commissioner the second time, on April 2, that he (said Van Winkle) noticed that the permit issued to him on March 11 bore on the stub in red ink the notation by Mahony (meaning the plaintiff): 'See me first.'

"'I am not the only person who h s been treated in this manner by the building inspectors,' said Mr. Van Winkle yesterday. 'Nearly every big building contractor and many of the smaller ones know that they must "square things" if they don't want their work to be tied up.'"

By means of the committing of which said several grievances by the defendants, the plaintiff has been greatly injured in his said good name, credit and reputation, and brought into public scandal and disgrace, and had been and is shunned and avoided by divers persons, and has been and is otherwise injured."

The second count of the declaration, for reasons stated in the opinion, need not be set forth.

This writ of error brings up for review the action of the court in sustaining the demurrers to the first count of the amended declaration and in overruling the demurrers filed by the plaintiff in error to the pleas of the statute of limitations to the second count.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

We think the demurrers to the first count of the amended declaration were properly sustained because that count contains no inducement or colloquium. As pointed out in the brief filed in behalf of xxx Van Winkle, one of the defendants in error, the following averments are lacking: That there was an office in or of the City of Chicago of building inspector or chief building inspector; that the plaintiff in error was such inspector; that plaintiff in error had any duties to perform in relation to inspecting buildings or passing on permits to erect or alter the same; that the building was in the City of Chicago; that a permit is necessary to alter or construct a building in the City of Chicago; that the City of Chicago has provided by ordinance or otherwise any rules in relation to the erection or alteration of buildings, or that any fee is required to obtain a permit. Some, if not all, of these allegations should have appeared in the declaration. The language used in McLaughlin v. Fisher, 136 Ill. 112, we think applicable to this case:

> "It is quite apparent that the pleader has made the innuendo perform the office of the inducement and colloquium. It is not permissible to enlarge and extend the meaning of the words spoken beyond their natural import, by the innuendo - except insofar as such enlarged meaning is warranted by prefatory matter set forth in the inducement or colloquium."

The first count of the amended declaration as well as the original declaration in the case before us, is totally lacking in what is called the inducement, and the requirement of an inducement may not be supplied in those portions of the count called innuendos. The rule may be otherwise in some jurisdictions, but we are controlled by decisions in this state. Patterson v. Edwards, 2 Gilman, 720; Gardner v. People, 3 Scam. 84; Kerr v. People, 42 Ill. 307. See also the case of People v. Keithley, 158 App. 11.

The second count of the amended declaration contains what is lacking in the first, namely, the inducement, and, as we understand the briefs of the defendants in error, sufficiently sets up a cause of action.

The question presented by the assignment of error based upon the proposition that the court erred in overruling the demurrers to the pleas of the statute of limitation filed to the second count, is whether a new or different cause of action is introduced by the additional count. It has been held that a new or different cause of action introduced by an additional count is treated as a new suit begun at the time of filing such count, and if the statute of limitations has run before the new count is filed the cause of action therein set up will be barred. Fish v. Farwell, 160 Ill. 236. It has also been held that the "cause of action may be regarded as the act or thing done or omitted to be done by one which confers the right upon another to sue; in other words, the act or wrong of the defendant towards the plaintiff which causes a grievance for which the law gives a remedy." Swift & Co. v. Madden, 165 Ill. 41. The cause of action in the case now under consideration was the publication of the alleged libelous matter. This matter was set up in <u>haec verba</u> in both the original declaration and in the first and second counts of the amended declaration. The second count of the amended declaration did not therefore set up a new cause of action. Muren Coal and Ice Co. v. Howell, 217 Ill. 190; Town of Cicero v. Bertelsen, 212 Ill. 256.

We think the demurrers to the pleas of the statute of limitations to the second count of the amended declaration should have been sustained. For the error pointed out the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

216 - 19221

UNITED FLOUR MILLS COMPANY,
Defendant in Error,

vs.

VACLAV C. KRYDA,
Plaintiff in Error.

185 I.A. 610

Error to
Municipal Court
of Chicago.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

Recovery was had in this case for loss of profits on account of the refusal of defendants to take two lots of flour under a contract of sale between the parties. It is claimed by the defendants that they were justified in refusing to take the two lots in question because the flour theretofore taken was not of the quality required under the contract to be furnished. This question of fact was passed upon by a jury, and we are unable to say from the record that the weight of the evidence in respect to it was not with the plaintiff. It is said in defendant's brief and the proof shows that payment had been made for the first flour furnished notwithstanding the fact that it did not come up to grade.

It is next urged that there was no proof that plaintiff suffered any loss. There was evidence tending to show that the market price in Chicago (the place fixed by the contract for delivery) was less on the date the flour should have been taken than the contract price, and the amount of such difference was given. The verdict was for this amount less an admitted set-off.

One of the courses open to a vendor where the vendee of goods refuses to take and pay for them, is to keep the goods and recover the excess of the contract price over the market price. White Walnut Coal Co. v. Crescent Coal & Mining Co., 162 Ill. App. 353; id. v. id., 254 Ill. 368. The case was tried

upon the theory of the plaintiff, that it was entitled to the difference between the contract price and the cost of manufacture, etc. Inasmuch as the plaintiff showed that there was a market for the flour in Chicago, and showed what the market price was at the time fixed for delivery, we are of opinion that the case should have been submitted to the jury on that basis.

Although possibly the case was not submitted to the jury with proper instructions as to the measure of damages, the result reached by the jury was correct, and errors in the instructions, if such there were, were harmless.

We find it unnecessary to comment upon other matters suggested in the briefs. The judgment is affirmed.

AFFIRMED.

271 - 10277

WESTERN RESERVE NATIONAL BANK,
of Trumbull County, Ohio,
Appellee,

vs.

SUPPLY MANUFACTURING COMPANY,
Appellant.

185 I.A. 612

Appeal from
County Court,
Cook County.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

Suit was brought upon several of a series of notes given a manufacturer of printing presses. All the notes were secured by a chattel mortgage upon the press sold, and those in suit were assigned by the manufacturer to the plaintiff. Special pleas were filed by the defendant setting out by way of recoupment a claim for damages alleged to have been suffered by it on account of the breach of warranty contained in the contract of sale between the manufacturer and the defendant-purchaser.

The notes being secured by chattel mortgage upon the press, were subject to the same defenses as they would be if suit were brought by the manufacturer the payee. Sec. 25 of Chapter 95, Revised Statutes.

Demurrers were sustained to the pleas and judgment entered in favor of the plaintiff.

The contract provided among other things that the manufacturer should furnish to the defendant a competent man to erect the press and instruct defendant's employes in the use of the feed and to demonstrate that the manufacturer's guaranty had been complied with. That guaranty was, that with a competent pressman the press would produce certain results which were set forth in the contract. The contract then provides that settlement should be made with the manufacturing company "upon fulfillment of the above guaranty," by payment of a certain amount in New York exchange (a used printing press to be taken by the

manufacturing company at a certain price as part of the cash payment) and the giving of notes secured by chattel mortgage for the balance of the purchase price.

We agree with the trial court that the special pleas did not set up a defense to the action. Settlement was to be made only after the manufacturer had demonstrated that the press would do the work and produce the results guaranteed. The pleas do not allege that the defendant delivered the old press or made the cash payment in accordance with the contract, but aver that the promissory notes and chattel mortgage were executed and delivered to the manufacturer, and that the notes sued upon are part of the notes so delivered, having been assigned to plaintiff.

It is evident that the "settlement" provided for by the contract was made when the promissory notes and chattel mortgage were delivered to the manufacturer, and it is also evident that the purpose of the ten days' test was to enable the defendant to ascertain whether the manufacturer had complied with its guaranty before such settlement was required to be made by the defendant. The principle announced in Wolf v. Monarch Refrigerating Co., 252 Ill. 181 is controlling. The trial court properly sustained the demurrers to the pleas, and the judgment is affirmed.

AFFIRMED.

300 - 19307

THE PEOPLE ex rel. ALBERT D. WOLF,
Appellant,

vs.

THE NEW ILLINOIS ATHLETIC CLUB OF CHICAGO,
Appellee.

185 I.A. 613

Appeal from
Superior Court,
Cook County.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Superior Court sustaining a demurrer to a petition for mandamus, filed by the appellant against the appellee. It appears that appellant was a member of the New Illinois Athletic Club of Chicago, an Illinois corporation, formed not for pecuniary profit. He was suspended for an alleged infraction of the rules of the club for six months, the date of his suspension beginning July 30, 1912. The period of suspension therefore expired January 30, 1913.

Copy of the record of the Superior Court was not filed in this court until March, 1913. The expense of obtaining this copy as well as the costs of this court might well have been saved. Should the case after a hearing on its merits be reversed and remanded, no order could be entered in the Superior Court other than one denying the petition, People ex rel. Wilson v. Ross, Secretary of State, 81 Ill. App. 387. "Courts, in the exercise of their jurisdiction in mandamus, will not award the peremptory writ where the right sought to be enforced is or has become a mere abstract right, the enforcement of which, by reason of some change of circumstances since the commencement of the suit, can be of no substantial or practical benefit to the petitioner." Gormley v. Day, 114 Ill. 185.

The appeal will be dismissed.

APPEAL DISMISSED.

330 - 19344

EMMA J. HERZOG,
Appellee,

vs.

GERMAN NATIONAL LIFE INSURANCE COMPANY,
Appellant.

185 I.A. 614

Appeal from
Municipal Court
of Chicago.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

On June 25, 1909, a policy, being No. 9994, was issued by the German Mutual Life Insurance Company upon the life of John A. Herzog, his wife, the plaintiff in this suit, being named as beneficiary. The policy contained a provision as follows:

> "After one year from its date this policy shall be incontestable except for the non-payment of premiums as herein provided, and subject to the conditions herein contained as to age, and as to military and naval service in time of war."

On July 27, 1912, the insured committed suicide. Meantime the defendant, German National Life Insurance Company, had taken over the business of the Mutual Company and reinsured its policy holders. On June 24, 1910, the defendant issued a receipt for the sum of $58.05, being "the one annual premium on policy No. 9994, continuing said policy in force for 12 months ending June 25, 1911," and at the same time the policy of the Mutual Company was left with the defendant. Some days later the plaintiff received a policy issued by the defendant, dated July 13, 1910, and subsequently a second policy, dated August 5, 1911, for the same amount. Both of the policies were held by plaintiff until after the death of her husband. The first of the two policies issued by defendant bears on its face the words, "this is issued in lieu of policy number 9994, dated June 25, 1909." The second policy, the words, "this policy is issued in lieu of

German Mutual Life Insurance Policy number 9994, dated 6/25/09." After the death of the insured both policies with proofs of death were delivered to the defendant. The original statement of claim based a right of recovery upon the policy dated August 4, 1911. In an amended statement right to recover was based on the policy dated June 24, 1910. The policy last referred to was produced by defendant at the trial, with lines drawn through the signatures of the officers of defendant who signed the policy, and the word "Canceled" upon it.

From a judgment in favor of plaintiff based upon the verdict of a jury this appeal has been perfected. As we understand the argument of defendant, it is that the judgment should be reversed as being against the weight of the evidence; that it was not shown that the policy upon which the judgment is based was in force as a reinsurance of the insured by the defendant in pursuance of its contract with the German Mutual Life Insurance Company.

Our opinion is that this fact was abundantly established by the oral and documentary evidence in the case, the latter including numerous receipts for premiums paid by the insured to the defendant company.

The remainder of defendant's argument has to do with questions that might have arisen if the policy had not contained the clause making the policy incontestable, as heretofore set forth. Royal Circle v. Achterrath, 204 Ill. 549; Flanigan v. Federal Life Ins. Co. , 231 Ill. 399; Monahan v. Fidelity Mutual Life Ins. Co. ,242 Ill. 488.

We find nothing in the record which should occasion a reversal of the judgment and it is therefore affirmed.

AFFIRMED.

October Term 1920.

95 - 16541.

185 I.A. 622

ALFRED F. CROFT, Plaintiff in Error,	ERROR TO
vs.	MUNICIPAL COURT
SAMUEL W. BOECKER, Defendant in Error.	OF CHICAGO.

MR. PRESIDING JUSTICE GRAVES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error brought suit in the Municipal Court as the assignee of the following instrument in writing:

"Application Blank No.....
Par Value $1.00 per share.
Dated, Sept. 22nd, 1910.
No stock sold Less Than Par.
Subscription for Capital Stock
Professional Investment Company.
To Messrs. Pratt and Company,
Fiscal Agents,
78 Dearborn Street, Chicago.

You are hereby authorized and requested to purchase for me, 100 shares of the common stock of the PROFESSIONAL INVESTMENT COMPANY, for which I agree to pay to your order, the sum of One Hundred Dollars, payable in the following manner, to-wit; $10.00 down and 10.00 per month until paid for.

SPECIAL NOTICE:

All payments on account of this subscription must be in New York or Chicago Exchange drafts or Post Office Orders made payable to the Professional Investment Co. care of Messrs. Pratt & Co., Fiscal Agents.

Samuel W. Boecker.
Applicants Name in full.
1021 Masonic Temple.
Address."

On the back of this instrument the following appears:

"In receiving this subscription, the Fiscal Agents, their Agents or employes, or companies they represent, make no statements or representations other than what appears in the printed literature issued by the companies which speak for themselves.

"No contract, agreement or statement made by our agents or employes are valid, other than written in this blank and approved of by the secretary of the company in writing.

Messrs. Pratt & Company,
Fiscal Agents.

"For value received, the within contract and all the payments due or to become due thereunder are hereby assigned

to Alfred F. Croft.

(Signed) PRATT AND COMPANY."

The finding of the court was against plaintiff in error and judgment was entered in bar of his action.

In construing a contract any memorandum either following the signature or on the back or margin of the instrument, made by the agreement of the parties or with their knowledge and acquiescence, contemporaneously with its execution, must be treated as forming part of it, the same as if it was in the body of the instrument. Van Zant v. Hopkins, 151 Ill., 348.

It is not claimed that the memorandum "Subscription for Capital Stock Professional Investment Company", at the top, the special notice on the face or the recitals on back of the instrument were not there when it was executed and delivered. In the absence of proof to the contrary it will be presumed that such memorandum, notice and recitals were made contemporaneously with it. Van Zant v. Hopkins, supra.

The caption or memorandum at the top of the instrument describes it as a "subscription for capital stock Professional Investment Company". The special notice described it as a "subscription" and provides that the payment therefor shall be made to that company. The instrument is addressed to "Pratt and Company, Fiscal Agents". The special notice provides that the payments shall be made to the Investment Company in "care of Messrs. Pratt & Co., Fiscal Agents". On the back thereof it is recited that, "In receiving this subscription the Fiscal Agents, their agents or employees, etc.", and this is signed, "Messrs. Pratt & Company, Fiscal Agents".

It is manifest from all the terms of this instrument that it was intended to be and in fact was a subscription for stock in the Professional Investment Company, for which defendant in error agrees to pay that company $100, and that it was so understood by the contracting parties.

The business of procuring this subscription was conducted by Pratt & Company, as agents for the Professional Investment Company, and the money to be paid for such stock was to be paid to the Professional Investment Company in care of these agents. They were styled and they signed the stipulation on the back of the instrument as "fiscal" agents. As more well, that term means financial agents. Although this subscription was addressed to Pratt & Company, Fiscal Agents, the words in the body of it, "for which I agree to pay to you or order the sum of One Hundred Dollars" were undoubtedly intended to be a promise to pay to the corporation for whose stock defendant in error was subscribing. It can be construed in no other way in the light of the special notice contained on the face of the instrument that "all payments on account of this subscription must be****to the Professional Investment Company".

There are several conclusive reasons why the judgment must be upheld. First. The writing sued on is not a negotiable instrument.

In order that an instrument should be negotiable it must amount to an independent promise to pay at all events, at a time certain, to a definite person, a definite amount without condition. Kingsbury v. Hull, 68 Ill., 511, Van-Zant v. Hopkins, 151 Ill., 112. See also Buckstrom v. Krona, 139 Ill. App., 376, and cases there cited.

Construing this contract most favorable to plaintiff in error the promise to pay contained in it is conditional and dependent upon the issuance to defendant in error by the Professional Investment Company of the shares of stock subscribed for by him. Unless it was so issued he had nothing to pay. Pratt and Company were not the owners of the stock. They were agents only, clothed with a commission to secure the issuance

of the stock subscribed for, which contribution they might never execute. It certainly was never intended that defendant in error should pay $100 or any part thereof for what he might never get. If it was issued to him as ordered the $100 to be paid was for the stock and not for the services of Pratt & Company in procuring the work to be issued. The promise to pay contained in the contract "for which I agree to pay to your order the sum of One Hundred Dollars, payable in the following manner, to-wit: $10.00 down and $10.00 per month until paid", unquestionably must be construed to be a promise to pay $10.00 when the stock is delivered to the subscriber, and $10.00 each month thereafter until paid. The instrument not being negotiable plaintiff in error by any attempted assignment could acquire no legal interest in it that could be enforced in the law courts.

Second. Even if it could be held that this contract was negotiable, it certainly was not so by mere delivery. In order to transfer title to it, it would be necessary for the payee to endorse it. This it never did. Neither has any one attempted to do so for it. The so-called endorsement is signed, "Pratt and Company". Neither the word agents or the words Fiscal Agents are added. Neither is there anything else to indicate that they were attempting in so doing to represent any one but themselves. The form of this endorsement, as well as the contentions made in the Municipal Court and in this court clearly show that Pratt & Company were assuming to be the owners of the contract and as such were attempting to assign it. We have held they were not the owners. Their assignment of even a negotiable instrument of which they were not the owners would convey no title.

Third. The record fails to show that any certificate of stock was ever delivered to defendant in error or

issued for him. The record does show that during the trial the attorney for plaintiff in error made a tender to the defendant in error in open court of a "certificate purporting to be" a certificate for one hundred shares of stock of the Investment Company, but it was not offered in evidence and is not preserved in the record. We are, therefore, not in a position to determine whether it was what it "purported to be" or not. Whatever it was, flourishing it round in open court was useless posturing, unless offered in evidence or in some way preserved in the record.

Objection is made that the subscription contract was improperly admitted in evidence, the contention being that its execution had been denied under oath and had not been proven. The part of the affidavit of merits which it is claimed is a denial of the execution of the instrument is as follows:

> "Affiant further says that said alleged contract was never fully executed as it was not to be considered a contract until the first payment of $10 was made by defendant which payment was never made."

The word "executed", as there used, refers to the performance of the contract and not to the act of signing and delivering it. It is the act of signing and delivering a written instrument that must be put in issue by affidavit, in order that proof of the same must precede the introduction of the instrument in evidence. City of Chicago v. English, 180 Ill., 476. The affidavit quoted did not put in issue the execution of the instrument.

The judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

October Term, 1916.

147 - 18601.

185 I.A. 624

WELSBACH STREET LIGHTING COMPANY OF AMERICA, Defendant in Error,	ERROR TO
vs.	MUNICIPAL COURT
JULIA K. BURDICK, Plaintiff in Error.	OF CHICAGO.

MR. PRESIDING JUSTICE GRAVES DELIVERED THE OPINION OF THE COURT.

An action was commenced in the Municipal Court by defendant in error against plaintiff in error based on an instrument in writing, on its face purporting to be a contract between the "Grand Crossing Business Men's Association of the City of Chicago, County of Cook and State of Illinois", as party of the first part, and the Welsbach Street Lighting Company of America, a corporation, the defendant in error here, as party of the second part. By the terms of the writing the party of the second part undertook and agreed to furnish, install and equip not less than 40 lamp posts and burners for street lighting and illuminant therefor, to be placed and maintained on Seventy-fifth street and other adjacent streets in Grand Crossing, as directed by the said party of the first part, the same to be there maintained for the period of two years. The party of the first part agreed to pay for all posts so erected, equipped, maintained and operated at the rate of $60 per post per year in monthly payments.

The record fails to disclose whether the party of the first part was incorporated or not.

This instrument was never executed by the party of the first part. It was duly executed by defendant in error as party of the second part. Between the attesting clause and the signature of defendant in error, a list containing the names of 40 persons and business houses appears. Follow-

ing the signature of defendant in error a second list containing 17 names of persons appears. The name of plaintiff in error is the last but one on the list of seventeen. There is no evidence in the record to show how any of the 57 names composing the two lists mentioned came to be there, excepting that of plaintiff in error. As to her name, the evidence discloses that some three weeks or more after the recitals in the instrument show it was attested a committee was appointed by the Grand Crossing Business Men's Association "to procure signatures for street lamps in Grand Crossing, to be installed by the Welsbach Street Lighting Company of America"; that the chairman of that committee, one F. Kornblum, waited on plaintiff in error and induced her to sign her name. Plaintiff in error testified that when Kornblum approached her, requesting her to sign the paper he said to her that "he was working in the interest of the Grand Crossing Business Men's Association". Although Kornblum was called by defendant in error in rebuttal he did not deny either that he told her what she said he did, or that he was in fact acting for the association. The only post shown to have been installed by defendant in error in compliance with the terms of the instrument in question was placed in front of the premises of plaintiff in error. After this post was installed, Kornblum presented monthly bills to plaintiff in error addressing her as "Mrs. Gold Dust Twins", and purporting on their face to be for a $5.10 debt due to the "Grand Crossing Business Men's Association".

There is no proof in the record that any of the 57 persons whose names comprise the two lists referred to, excepting that of Kornblum, was a member of the Grand Crossing Business Men's Association. The proof affirmatively shows that plaintiff in error was not a member of that association.

There is, therefore, nothing in this record to support a finding that plaintiff in error or any of the 57 persons whose names compose the two lists, signed the instrument as and for an unincorporated association of individuals by the name of the Grand Crossing Business Men's Association. All the evidence in the record tends to show they did not so sign it.

We have then before us an instrument prepared and intended to be signed by two parties therein expressly named, containing no promise or undertaking to be performed by any one, except the named parties, signed by a person who is a total stranger to the covenants therein contained, which it is sought to enforce against such stranger. The Municipal Court held plaintiff in error liable and rendered judgment against her for $30 for six months lighting at $5 per month.

We believe the settled law to be that when an instrument in writing purports on its face to be made by certain parties named therein and the signature of a party not named therein appears to the instrument, it is not the deed or contract of such last named party, and parol testimony is not admissible to show that he intended to bind himself thereby. Brown v. O'Byrne, 153 Ala., 621; Lancaster v. Roberts, 144 Ill., 213; Doyle v. Dunne, 144 Ill. App., 14; Dunne v. Bloel, 156 Ill. App., 480; Baker v. Baker, 139 Ill. App., 217-228.

We do not hold that plaintiff in error may not be liable to some one for the light furnished. What we do hold is that she is not bound by or liable on the writing made the basis of this suit.

The judgment of the Municipal Court is, therefore, reversed.

JUDGMENT REVERSED.

October Term, 1911, Cont.

188 - 18645.

185 I.A. 626

CHARLOTTE HIRSCHL, Appellant,	APPEAL FROM
vs.	CIRCUIT COURT,
Estate of ISABELLA C. MACKER, deceased, Appellee.	COOK COUNTY.

MR. PRESIDING JUSTICE GRAVES DELIVERED THE OPINION OF THE COURT.

On November 20, 1907, appellee executed a promissory note, payable to the order of himself for $1,400, due in five years after date. On the same day he executed a trust deed conveying to the Chicago Title & Trust Company certain real estate to secure the payment of the note. Later, Samuel E. Gross became the owner of this same real estate, subject to the trust deed. In April, 1908, Gross conveyed it by warranty deed to Isabella C. Macker, subject to the said trust deed. The deed to Isabella C. Macker contained the following:

"But it is expressly understood that the said grantee herein does not assume and is not to be or become personally liable for the payment of said note and interest, or any portion thereof."

On the back of the note and presumably on the date it was executed was written: "Pay to order of Charlotte Hirschl, Fredrick J. Sanford." The name "E. R. Dickinson" was also written there. On November 20, 1907, there was written on the back of the note, "Within note is hereby extended on same terms for a period of three years." That stipulation was signed by Fredrick J. Sanford, the maker of the note, and Isabella C. Macker, the then owner of the real estate covered by the trust deed. On May 28, 1910, Isabella C. Macker having died the note was presented to the Probate Court of Cook County as a claim against her estate. The claim was disallowed by the Probate Court. An appeal was

perfected to the Circuit Court where the claim was again disallowed. From the judgment of the Circuit Court disallowing the claim this appeal is prosecuted.

Isabella G. Wecker not having signed the note and not having assumed or undertaken to pay the same in the transaction in which she became the owner of the real estate, her estate is not liable thereon, unless such liability was created by signing her name with that of the maker of the note to the stipulation for an extension of time for the payment of the same. The language in that stipulation is plain and unambiguous. Her title to the real estate was pledged as security for the payment of the note. She personally was under no obligation to pay it, but she had the right to demand that it should be paid at maturity and her property thereby be freed from the encumbrance. The fact that she consented that her land might continue to be burdened with the encumbrance for three years more took no right from the holder of the note. Neither did it create on Isabella G. Wecker any obligation to pay it. What she did, she put in writing on the note and signed it. The contract thereby entered into by which she agreed to the extension of the time in which the note must be paid can not be broadened by parol evidence into a promise to pay it or any part of it, or to be liable for its payment as guarantor, endorser or otherwise. What has been said disposes of all questions presented by this appeal.

The judgment of the Circuit Court was right and the same is affirmed.

JUDGMENT AFFIRMED.

October Term, 1912 No.
304 - 18862.

185 I.A. 627

ILLINOIS PUBLISHING AND PRINTING COMPANY,
Appellee,

vs.

THE PEOPLES GAS LIGHT AND COKE COMPANY,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE GRAVES
DELIVERED THE OPINION OF THE COURT.

Appellee is a corporation engaged in printing and publishing a newspaper known as The Chicago Examiner. Appellant is also a corporation and is engaged in manufacturing and selling gas and gas fixtures. This suit was begun by appellee in the Municipal Court to recover of appellant pay for publishing advertisements in The Chicago Examiner at the instance of appellant between October 4, 1910, and January 1, 1911. Judgment was entered on a directed verdict for $1,767.40 in favor of appellee and against appellant.

The declaration filed by appellee consists of the common counts and one special count. The special count is based on what the pleader construes to be an accepted written offer for at least 21840 agate lines of advertising matter to be published in The Chicago Examiner during the year 1910, at the rate of 20 cents per agate line. The so-called "written offer" is set out in the special count and is in the words and figures following:

"CHICAGO, March 5, 1910.

The Examiner,
140 Franklin St.,
Chicago.

GENTLEMEN:-

We enclose herewith formal order authorizing you to run our advertisement entitled 'Smokeless Fuel' to occupy space three columns wide by ten inches deep, in your issue of Thursday, March 10th.

"Our advertising schedule contemplates the use of

21,840 agate lines in your publication during the year 1910.

"It is understood that the use of this amount of space, copy similar to the enclosed, will entitle us to the rate of 20¢ per agate line.

"We will send you copy to appear at regular intervals, probably once a week, and as in the past, will leave the matter of position entirely to you, knowing that you will take good care of us.

Yours very truly,
PACIFIC GAS LIGHT & COKE COMPANY."

Appellant does not deny that the advertisements in The Examiner were published at its instance and request or that the charge therefor is incorrect, but insists that the writing set out in the special count is not a contract, request or authority for the publication of any advertisement except the one expressly referred to therein, "entitled 'Smokeless Fuel' to occupy space three columns wide by ten inches deep", and to be published in the issue of The Examiner of Thursday, March 10, 1910, only. It does, however, deny that it owes appellee anything and by a very comprehensive affidavit of merits the nature of its claimed defense is shown to be that one Roger C. Sullivan had contracted with the Commercial Times Company, a corporation, at that time publishing a paper known as The Commercial Times, for advertising space in that paper for the sum of $5,000, which space was to be used within five years from the date of its purchase by any person, firm or corporation who should be designated by the said Sullivan; that on August 19, 1910, appellee having secured the ownership and control of The Commercial Times Company, and of that paper, as a part of the transaction by which it became the owner thereof, entered into a contract in writing with appellant whereby it agreed that if appellant would purchase of the said Sullivan his advertising contract with The Commercial Times Company, and pay him $5,000 therefor, appellee would, in case the publication of The Commercial Times was within five years from that date suspended, or its circulation become nominal merely, publish in The Examiner without further

charge to appellant advertisements that, if charged for at the then current rates, would cost an amount equal to the unexpended part of the $5,000 mentioned in the Sullivan agreement, and paid therefor the sum of $5,000 in cash; that early in October, 1910, by the direct act of appellee the publication of The Commercial Times was discontinued; that thereupon it became and was the duty of appellee to publish advertisements for appellant and apply the charges therefor on the Sullivan contract; that thereupon the $5,000 paid by appellant for the Sullivan contract became and was a payment in advance of that amount to appellee for advertisements to be inserted in The Chicago Examiner; that all advertisements published at the instance of appellant in The Chicago Examiner before October 4, 1910, have been paid for in cash and that all such advertisements so published after October 4, 1910, were furnished by appellant and published by appellee under and in accordance with the contract of August 19, 1910, and were paid for in advance. Appellant also filed a claim for set off for $2,350.00, being the difference between the amount the advertisements published by appellee after October 4, 1910, would cost if charged for at the current rate, and $5,000, on the theory that appellee had since publishing the advertisements sued for refused to perform its contract of August 19, 1910, and, therefore, must respond in damages to appellant to the extent of the amount of the unexpended part of the $5,000 Sullivan contract. Appellee by its affidavit of merits to appellant's claim of set-off denies any breach of contract; avers that if there was any breach of such contract it was committed by appellant and denies damages and the amount thereof. By an amended affidavit of merits appellee denies that the contract relied on by appellants for a set-off was authorized by appellee or executed by any one having authority so to do,

and that it was not within the scope of its usual and legitimate business. Appellant's affidavit of merits and its claim of set-off were stricken from the files during the trial.

Much time and space have been used by counsel in discussing pro and con whether the so-called "offer" set out in the special count, together with what was done in pursuance of it, amounted to a contract for a definite amount of advertisement, and whether it was at the best more than a unilateral contract. As we view the case, those questions are wholly immaterial.

This action is not brought to recover for a breach of this so-called contract because appellant failed to use a given amount of space in advertising, but is to recover for space that was in fact used. Again, the writing in question was not introduced in evidence and is nowhere preserved in the record. The question, therefore, is not before us in any way for review. If, however, we should assume that the writing is truly set out in the declaration, we have no hesitancy in saying that it is not an offer to take any definite amount of advertising space, except such as was ordered for the issue of The Examiner of March 10, which space was paid for at the end of the month, and is not involved here. Beyond that the writing is no more than the expression of the writer's understanding that if appellant should use a certain amount of advertising space within the year 1910, then the rate would be 20 cents per agate line.

The striking of the affidavit of merits and claim of set-off of appellant from the files presents the question whether the contract of August 19, 1910, as therein set out, is valid and binding on the parties. On this question counsel for appellee has contented himself by suggesting in his argument that it is at the best a mere guaranty by one corporation of the obligations of another corporation, and that

even if such a contract could properly be made, which he considers is a mooted question, it can only be done by the authority of the directors of the corporation, and that as this contract is not shown to have been so authorized it has no binding force.

We think counsel has misconstrued or overlooked the averments in the affidavit of merits, which for the purpose of determining this question must be taken as true. By that document it is made to appear that the undertaking of appellee is an original one, based on an entirely new and independent consideration moving from appellant to Roger C. Sullivan, namely, the payment to him of $5,000 for his contract with The Commercial Times, which payment it is averred was made at the instance of appellee and because and in consideration of the making by appellee of the contract of August 19, 1910. The fact that the money was paid by appellant to some person other than appellee renders it none the less a valuable and valid consideration. Neither is it material, under the pleadings as they stand, what motive prompted appellee to make the contract, so long as it did make it. If, however, it were important to show a direct consideration moving to appellee, it is shown by the affidavit of merits wherein it is alleged that The Commercial Times was a competitor in business of appellee and that appellee absorbed and became the owner and had complete control of this competing paper, and suspended its publication, and that as a part of the transaction by which appellee secured the ownership and control of it, the contract of August 19, 1910, was entered into. This promise to appellant was, therefore, according to the averments of the affidavit of merits, a part of a transaction by which appellee freed itself from competition by absorbing the competitor.

It is further stated in the affidavit of merits that

all advertisements of appellant published in The Examiner after October 4th were so published after the publication of The Commercial Times had ceased and were furnished by appellant and published by appellee under and in accordance with the contract of August 18, 1910. If that averment is true, then appellee has ratified the contract of August 18th, and must abide by it and can not now be heard to say it was executed without authority. Not only that, the affidavit of merits further shows that full compensation for publishing such advertisements has already been received by appellee; that it has already received credit for the same on the contract of August 18, 1910. The truth of the averments in this affidavit of merits can only be questioned by taking issue thereon and can only be determined by a trial of such issue on the merits. Striking the affidavit of merits from the files was unwarranted. It further appears from the affidavit of merits of appellant that there is still due from appellee to appellant $2,356.20, which appellee refuses to pay in advertising space. Such refusal, if proven, would constitute a breach of the contract of August 18, 1910, entitling appellant to recover by way of set-off for the unused part of the five thousand dollars worth of advertising space contracted for.

There is nothing in the contention that the claim for set-off is for unliquidated damages. If it was a question as to how many lines of advertisement appellant was yet entitled to under its contract, there might be some uncertainty about it, but that is not the question. There is apparently no conflict between the parties as to how much of the five thousand dollars worth of space has been used or as to how much in dollars and cents the space used represents. How much is still due is, therefore, a mere matter of subtraction.

Enough has been said to show that striking from the files the affidavit of merits and claim for set off-was

manifest error requiring the reversal of the judgment, and the remandment of the cause for such further proceedings as may be had not inconsistent with the views here expressed.

REVERSED AND REMANDED.

October Term, 1919.

259 - 16870.

185 I.A. 628

N. LANDON HOYT,
Defendant in error,

vs.

SCHILLO MOTOR SALES CO., F. W. SCHILLO, and A. C. SCHILLO,
Plaintiffs in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE FRANK DELIVERED THE OPINION OF THE COURT.

This writ of error is prosecuted to review the record of a proceeding in the Municipal Court, where, upon a trial by the court, the defendant in error, N. Landon Hoyt, recovered a judgment against plaintiffs in error, F. W. Schillo and A. C. Schillo, co-partners doing business as Schillo Motor Sales Company, for $800, as damages alleged to have been sustained by defendant in error by reason of the failure of plaintiffs in error to comply with the terms of an alleged contract for the exchange and sale of two automobiles.

At the time of the transaction in controversy plaintiffs in error were sales agents of the Mercer automobile and defendant in error was the owner of a Thomas car which he was desirous of exchanging for a Mercer automobile. Plaintiffs in error had a prospective customer, residing in Canada, who had signified his desire to purchase a Thomas car of the type owned by defendant in error.

On May 20, 1919, as nearly as the date can be ascertained from the record, defendant in error went to the place of business of plaintiffs in error, where he had an interview with one, F. C. Williams, who was employed by plaintiffs in error as a salesman, relative to the exchange of his Thomas car for a Mercer automobile, and requested Williams to examine the Thomas car and submit a proposition by plaintiffs in error for an exchange. On the same day Williams and F. W. Schillo,

one of the plaintiffs in error, examined the Thomas car, and on the following day, May 31st, Williams dictated to a stenographer a form of proposal and agreement to be submitted to defendant in error for his signature, and showed the same to E. W. Schillo, who approved the same, and thereupon, on the same day Williams took the said proposal and agreement as prepared in duplicate, to the office of defendant in error where a conference was had relative to the matter.

The proposal in question authorized plaintiffs in error to enter the order of defendant in error for one Mercer automobile for which he agreed to pay $2,500, payable in one Thomas car valued at $1,800, to be delivered at the time of signing said proposal and the balance, $700, upon notification that the Mercer automobile was ready for delivery, and there was embodied therein the following: "We allow $1,800 in trade for Model K, 1870 Thomas car referred to above". As a part of the same transaction Williams also submitted to defendant in error for his signature a form of agreement prepared in duplicate, and approved by plaintiffs in error providing that if defendant in error could not take the Mercer automobile at the time of delivery and so notified plaintiffs in error in writing, he should give plaintiffs in error notice thereof two weeks prior to July 1st, in order that plaintiffs in error might sell said automobile, and that they should receive 10% commission for selling the same, same sale to be made for defendant in error at $2,500, f. o. b. Trenton, N. J., plaintiffs in error to collect $50 freight for defendant in error.

The evidence tends to show that after an inspection of the papers submitted to him defendant in error made some changes and interlineations therein with respect to matters of minor consequence not affecting the substance of the pro-

posal and agreement as submitted to him; that Williams then requested defendant in error to sign the same, and defendant in error refused to do so unless Williams would sign the same on behalf of plaintiffs in error; that Williams then suggested to defendant in error that as he, Williams, was merely a salesman the probability was that his signature would not be final and binding on plaintiffs in error; that upon the continued insistence of defendant in error that he would not sign the papers unless Williams would also sign then the latter affixed the trade name of plaintiffs in error thereto and the same were then also signed by defendant in error; that it was then agreed and understood between defendant in error and Williams that in view of the fact that some changes and interlineations had been made in the papers as originally drafted, they should be rewritten and returned to defendant in error for his signature; that Williams then left a copy of the papers with defendant in error and himself retained a copy and returned to the place of business of Plaintiffs in error where he exhibited the portion of the papers including the signature of defendant in error to E. F. Schille who then said, "That is all right". The evidence further tends to show that on the following day plaintiffs in error ascertained that they would be unable to dispose of the Thomas car to their prospective customer from Canada and so informed Williams who then told plaintiffs in error that he had already signed a contract with defendant in error for the exchange; that plaintiffs in error then told Williams he had no authority to sign such a contract on their behalf and they would not be bound thereby; that on the following day defendant in error having failed to receive a corrected copy of the papers from plaintiffs in error went to their place of business and demanded a delivery of the Mercer automobile and was informed by plaintiffs in error that they had no contract with him; that on the same or following day in reply to a written communication from defendant in error

demanding a compliance by them with the terms of the contract plaintiffs in error wrote defendant in error that inasmuch as they had neither signed the contract nor authorized anyone to sign the same for them they were not bound thereby.

The measure of damages adopted by the trial court was the difference between $1,800, the price at which it is claimed plaintiffs in error agreed to take the Thomas car, and $1,500, which the proof tends to show was its fair market value, and it is not claimed that such measure of damages was improperly applied.

Plaintiffs in error seek to disaffirm the contract or to avoid any liability thereunder upon the ground that by its terms it amounted merely to a proposition by defendant in error for an exchange of automobiles, or an order by him to them for an automobile upon certain terms made at the solicitation of their agent, Williams, which did not become binding upon them until they accepted and ratified the same, and that the proof fails to show any such acceptance or ratification by them.

This contention of plaintiffs in error is wholly inconsistent with the undisputed facts in the case. The terms of the written proposal submitted to defendant in error for his acceptance and signature were determined and formulated by plaintiffs in error and not by their agent, Williams, and the latter, in submitting such proposal to defendant in error, acted merely in the capacity of a messenger to obtain the acceptance and signature of defendant in error to such proposal. If plaintiffs in error intended that their proposal to defendant in error for an exchange of automobiles should only become effective and binding in the event that their customer from Canada took the Thomas car, they should have provided for such contingency in their said proposal.

Upon the return of Williams with said proposal so accepted and signed by defendant in error, plaintiffs in error not only affirmatively expressed their assent thereto, but they proceeded to act thereon by negotiating with their customer from Canada for the sale to him of the Thomas car. Upon the facts disclosed by the evidence plaintiffs in error were bound by the proposal notwithstanding their failure to affix their signature thereto. A contract signed by only one of the parties is mutual and binding upon both, if the other party, upon its delivery to him, assents to its terms and holds and acts upon it as a valid agreement. Sellers v. Greer, 172 Ill., 549; Clark v. Potts, 255 Ill., 187.

It cannot be doubted that if plaintiffs in error had been successful in concluding their negotiations with their customer from Canada for the sale to him of the Thomas car, they would have held defendant in error bound by the terms of the contract.

The judgment stands for substantial justice under the law and is affirmed.

JUDGMENT AFFIRMED.

October Term, 1912. No.
363 - 18829.

185 I.A. 638

PETER GILDEA,
Defendant in Error,
vs.
ILLINOIS TUNNEL COMPANY,
Plaintiff in Error.

ERROR TO
SUPERIOR COURT
COOK COUNTY.

MR. JUSTICE BAUER DELIVERED THE OPINION OF THE COURT.

This writ of error is prosecuted by the Illinois Tunnel Company to review the record of a proceeding brought against it in the Superior Court by Peter Gildea to recover damages for personal injuries, wherein a trial by jury resulted in a verdict and judgment against defendant for $3,000.

The cause of action accrued November 29, 1908. A declaration containing three counts was filed August 20, 1909, and an additional count was filed January 13, 1911.

The first count of the original declaration alleges that defendant owned and operated a certain underground railroad in the City of Chicago and plaintiff was in its employ; that defendant had a certain elevator with a track thereon, which track was intended to be on a level with a track of its railroad which abutted upon and connected with said track on said elevator; that defendant was accustomed to run cars from said railroad track onto the track on said elevator whereby said cars were raised to or above the surface of the ground, and that the reasonable safety of defendant's employes required that said elevator should be so constructed and maintained that the track upon said elevator would be on a level with the said track of said railroad so abutting upon said elevator; that the defendant long prior to the time in question wrongfully and negligently constructed said elevator in such an improper and defective manner, and from thence to the time of the accident wrongfully and negligently so maintained said elevator,

that said elevator, when a car was placed upon it for the purpose of being raised, as aforesaid, would sink down, so that the track upon said elevator would be, to wit, three inches below the level of the track of said railroad, so abutting upon said elevator, and as a result and in consequence thereof the defendant's employee, engaged in so placing said cars upon said elevator for the purpose aforesaid, were exposed to great danger of bodily injury, and all of which the defendant knew, or by the exercise of ordinary care could have known, a sufficient length of time prior to the injuries complained of, to have enabled it by the exercise of ordinary care to have repaired and maintained said elevator so that the track upon the same would be on a level with the track of said railroad; that plaintiff, through no want of ordinary care did not know of said condition of said elevator and the danger incident thereto; that the defendant also knew, or by the exercise of ordinary care in that behalf would have known of the plaintiff's lack of knowledge of said conditions and danger, in time to have enabled it by the exercise of ordinary care to have warned or informed plaintiff of said condition and danger. Said count further alleges that plaintiff was required by defendant to assist in running cars from said track abutting on said elevator onto and upon the track which was upon said elevator, so that said cars might be elevated to or above the surface of the ground, and upon the occasion in question a certain car was so run from said track onto said elevator, and as a direct result and in consequence of the improper and defective manner in which said elevator was so constructed and maintained, it thereby then and there sunk down so that the track upon said elevator was three inches below the level of the track of said railroad, and it then and there became and was the plaintiff's duty to uncouple said car so upon said elevator from certain other

cars upon said track to which it was then coupled, and he then and there necessarily went between said cars in order to uncouple the same, and while so between said cars in endeavoring to uncouple them, and while exercising ordinary care for his own safety, the said car on said elevator started to run off said elevator, and as a direct result and in consequence of said elevator sinking as aforesaid plaintiff's left foot was thereby then and there caught and crushed between one of the wheels of said car and the end of said track abutting upon said elevator, etc.

The second count alleges that defendant was negligent in failing to build a recess or open space alongside of said track, where the employes could stand while uncoupling cars; that plaintiff did not know that there was no recess or opening alongside of said track at said place for the purpose aforesaid until immediately before the time of the injury, when he had no right to then abandon his work and he did not voluntarily then assume the risk created by the absence of such recess or opening and because of the absence of said recess he was injured, etc.

The third count alleges defendant wrongfully and negligently failed and neglected to maintain lights at said place for the purpose aforesaid, but therein wholly failed and made default; that plaintiff did not know of same until the occasion in question and that he then had no right to abandon his employment and did not assume the risk, so that by reason of failure of the lights and the darkness he was injured, etc.

The additional count omits the averment that defendant had the elevator in question, but alleges as in the original counts the negligence of the defendant in the maintenance and construction of said elevator, so that it could sink down three inches when a car was placed thereon; negligence in failing to have a recess, as in the original second count;

negligence in failing to light, as in the original third count; and further alleges that as a direct result and in consequence of the absence of a sufficient light or lights, at said place, and of defendant's failure and neglect to so notify and warn him of the liability and likelihood of said elevator so sinking down, he, through no want of ordinary care upon his part, did not learn or know that said elevator had so sunk down, as aforesaid.

Defendant filed its plea of the general issue to the original declaration and the additional count, and also filed its plea of the statute of limitations to said additional count, wherein it averred that the several supposed causes of action in said additional count mentioned did not, nor did any or either of them, accrue to the plaintiff at any time within two years next before the filing of said additional count, etc. The demurrer of the plaintiff to said last mentioned plea was sustained and defendant elected to abide by its plea.

The material facts are not seriously controverted. Defendant owns a system of tunnels under the streets of the city, wherein are laid tracks upon which it operates between railroad stations, warehouses and stores, small freight cars, drawn by motors. From such main haulage ways or tunnels, "by passes" of similar design and on the same level run through privately owned property leased for a long term of years to the Chicago Warehouse and Terminal Co., into the sub-basements of the buildings, to and from which freight is transported. The accident here involved occurred in the by-pass in the sub-basement of a nine story building owned by the Steele-Wedeles Company, and used for warehouse or mercantile purposes. The elevator shaft in said building extended from the tunnel level to the top of the building and upon an elevator operating between said points the freight

cars were carried to and from the several floors of the building and the track level in the by-pass. The elevator was installed in the building for the Steele-Wedeles Company and had been in operation about a month. The floor of the elevator was equipped with a car track, which, when the elevator was lowered to the tunnel level, corresponded precisely with the car track in the by-pass from the north, so that loaded cars coming from that direction could be moved directly upon the elevator platform, uncoupled and carried where required. South of the elevator shaft and in the sub-basement beneath the building were switch tracks constructed and used by defendant, which switch tracks connected with the track upon the elevator platform, when the same was lowered to the track level in the by-pass. The elevator was operated by one, Fisler, who was hired by defendant and who was subject to be discharged by it, but defendant was reimbursed by the Steele-Wedeles Company for one-half of his wages paid to him by defendant. Prior to his injury the plaintiff had been in the employ of defendant about six weeks; first as a motorman and subsequently and at the time of his injury, as a switchman and oiler. He had, however, never previously worked in the by-pass or at the elevator in question. On the day in question fourteen cars loaded with cans and boxes were to be carried to the building. The cars were divided into two trains, the first consisting of five cars and the second of nine cars. When the first train of five cars reached the switch track leading into the by-pass, plaintiff, who was riding on the motor, got off and threw the switch and returned to the motor, and the train was then backed south in the by-pass to the elevator shaft where the cars were uncoupled and spotted on the elevator by Fisler and carried by him on the elevator to the several floors of the building as required. Thereafter, when the second train consisting of nine cars arrived at the by-pass plaintiff threw the

switch and rode on the south end of the train or walked ahead of it on the track to the elevator, where he and Fisler stationed themselves on the south side of the elevator. There was no light in the by-pass or at the elevator, save the lantern carried by Fisler, plaintiff having left his lantern on the motor at the north end of the train. When the first car was run onto the elevator platform plaintiff climbed upon the load and over the top of the car to its north end, where it was coupled to the train, and went down between the two cars, where he lifted the coupling pin and by calling signalled the motorman to go ahead. Then, in response to such signal, the motorman pulled ahead the first car became uncoupled and was then spotted on the elevator and carried above by Fisler. Five or six cars of the train were uncoupled by plaintiff and carried on the elevator in precisely the same manner as the first, and the method so adopted was the usual and customary method of doing the work, and the only practical method in which the work could be done under existing conditions. There was not sufficient space between the sides of the elevator or of the by-pass and the sides of the cars to permit a person to pass between the cars and the sides of the elevator or of the by-pass, and there was no recess in the by-pass, at the point where the cars were required to be uncoupled where a person might stand with safety, while uncoupling the cars. After these several cars had been so placed upon the elevator and uncoupled and carried up to one of the floors of the building, the elevator descended to the sub-basement and the track on the platform of the elevator was brought on a level with the track in the by-pass, so that the next car to be raised could be properly placed and spotted on the elevator. When the car was so placed, plaintiff climbed upon and over the top of it into the space between the two cars for the purpose of uncoupling it and there stood with his right foot on the

coupler of the north car and his left foot on the elevator platform. He then lifted the coupling pin and signalled the motorman to pull ahead for the purpose of completing the uncoupling. When the motorman pulled ahead the cars failed to uncouple by reason of the fact that the elevator platform had sunk three or four inches below the level of the track in the by-pass, and thus prevented the proper operation of the mechanism of the couplers. Plaintiff then sought to extricate his left foot from its position on the elevator platform, but before he was able to do so it was caught between the wheel of the car and the rail of the track in the by-pass and thereby crushed.

For months prior to the injury to plaintiff it was observed by Fisler that when a heavily loaded car was placed upon the elevator, it would sink three or four inches below its proper level. The evidence tends to show that this sinking of the elevator was occasioned by the stretching of the steel cables, which were comparatively new, and had not been operated a sufficient length of time to take up the natural slack; that although this condition was usual and one reasonably to be anticipated by defendant, it did not operate to prevent the elevator from being raised to the proper level by means of the lever, after the car had been placed upon it. The evidence further tends to show that plaintiff had no notice or warning that the elevator was liable to or would so sink, and had no knowledge of that condition; that none of the elevators in the several other by-passes in which he had previously worked sank below the proper level; that all of the other by-passes leading from the main tunnels were provided by the defendant with electric lights located at the elevators, and that a recess was provided in the side of each of such other by-passes at a point where the cars were required to be uncoupled.

It is insisted that the court improperly sustained

plaintiff's demurrer to defendant's plea of the statute of limitations to the additional count, because said count stated a new cause of action which was barred by the statute, namely, a failure to notify or warn plaintiff that the elevator was liable to sink when a loaded car was placed upon it. It appears to be further claimed that as the several counts of the original declaration allege that defendant had a certain elevator, which, it is said, necessarily implies ownership of the elevator by the defendant, and the additional count merely alleges that defendant had a certain track which connected with the track upon a certain elevator, such additional count alleges a new cause of action predicated on the existence of a different relation between the parties, whereby the legal duties arising out of such relation were changed, and that a failure to prove that defendant was the owner of said elevator, as alleged in the original counts of the declaration, constituted a fatal variance.

While the additional count was vulnerable to attack by special demurrer because it alleged three independent wrongful acts as grounds for recovery, in the absence of such attack, if any one of such grounds for recovery or causes of action was not barred by the statute, a plea of the statute of limitations to the entire count was subject to demurrer. In Penn. Co. v. Sloan, 125 Ill., 72, it is held that where several causes of action are set up in separate counts and defendant pleads the statute to the whole declaration, plaintiff is entitled to recover if one of his causes of action is not within the bar. We are unable to perceive any substantial reason why this rule is not as applicable to a single count, not challenged by special demurrer, which alleges several distinct causes of action, as it is to a declaration which contains separate counts.

Under the facts set up in the original declaration substantially the same duty was imposed upon defendant with reference to maintaining the elevator and by-pass in a reasonably safe condition for use by its employes, as would have been imposed upon defendant if it had been the owner of the elevator. Illinois Term. R. R. Co. v. Thomson, 210 Ill., 326. The elevator was operated by a servant of defendant for the uses and purposes of defendant, and together with the by-pass constituted a constituent part of the instrumentality adopted by defendant for the transaction of its business.

It cannot be doubted that plaintiff attempted in and by his original declaration to state a cause of action predicated on the failure of defendant to notify and warn plaintiff of the condition of the elevator, with reference to sinking below the proper level and of the danger incident to such condition. In this respect, however, the declaration merely stated a cause of action defectively, and the restatement of said cause of action in apt form, did not amount to the statement of a new or different cause of action. The demurrer to the plea of the statute of limitations was properly sustained.

What has been heretofore said sufficiently answers the contention of defendant relating to an alleged fatal variance between the allegations of the declaration and the proof.

There is a conspicuous lack of definite proof as to the precise status of the Chicago Warehouse & Terminal Co., the lessee for a term of 85 years of the basement of the Steele-Wedeles Co. building, including the elevator shaft, by-pass and switch tracks and yards in said basement. There is, however, some evidence tending to show that the interests of the Chicago Warehouse & Terminal Co. and of the defendant in the portion of the basement covered by said lease were identical; that the Chicago Warehouse & Terminal Co. was merely a holding company for defendant. It is uncontroverted

that defendant was in actual possession of that portion of the premises in question.

A consideration of the facts disclosed by the evidence, as heretofore recited, impels us to the conclusion that the defendant was guilty of negligence alleged in the declaration in the respects following: First, in failing to notify and warn plaintiff of the condition of the elevator and of the danger incident thereto; second, in failing to provide a recess or opening in the side of the by-pass; and, third, in failing to maintain sufficient light at the place in question.

The duty imposed by law upon the defendant to warn the plaintiff of a defective and dangerous condition of which plaintiff, without his fault, was ignorant, was a duty which it could not delegate. Rogers v. C. C. C. & St. L. Ry. Co., 211 Ill., 126; Peck Bros. Coal Co. v. Thil, 208 Ill., 233.

Whether or not upon the evidence adduced plaintiff was at fault in failing to observe the defective and dangerous condition of the elevator, or was guilty of negligence contributing to his injury, or assumed the risk arising from the failure of defendant to perform its duty in the respects mentioned, were all questions of fact properly submitted to the jury, and as to which the verdict of the jury must, in this case, be held to be conclusive.

What we have heretofore said disposes of the objections urged to the first and second instructions given at the instance of the plaintiff.

Two instructions relating to the fellow servant doctrine tendered by defendant were refused by the court. The instructions taken together did not accurately state the rule relating to fellow servants and were properly refused for that reason; but we are also disposed to hold that the fellow servant doctrine had, under the allegations of the declaration

and upon the evidence adduced, no proper place in the case; that an application of the rule accurately stated could not exempt defendant from liability. Other refused instructions were sufficiently covered by the instructions given to the jury.

There is no reversible error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

October Term, 1923 No.
373 - 18840.

185 I.A. 639

JAMES A.CUMMINS, Administrator of the Estate of FRANCIS KULVINILL, deceased, Appellee, vs. SANITARY DISTRICT OF CHICAGO, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE HAUNE DELIVERED THE OPINION OF THE COURT.

This is an action in case brought in the Superior Court by James A. Cummins, an administrator of the estate of Francis Kulvinill, deceased, against the Sanitary District of Chicago and the Commonwealth Edison Company to recover damages for wrongfully causing the death of plaintiff's intestate. Plaintiff recovered a verdict and judgment against said Sanitary District, the appellant here, for $8,000. The defendant, Commonwealth Edison Company, was found not guilty.

No evidence was introduced by either of the defendants. The evidence introduced on behalf of plaintiff discloses the following state of facts: On and for some time prior to September 5, 1909, appellant was engaged in excavating a ditch in and along the south side of 39th street near the south curb. At a point in said street 35 or 40 feet west of Cottage Grove avenue, and close to the ditch there excavated, was a wooden pole belonging to the Commonwealth Edison Company equipped with cross-arms and apparatus and appliances in use by said company in its business of furnishing electric light and power. One cross-arm extending east and west on the north side of the pole was about 25 feet above the ground. There were two other cross-arms extending north and south, one on the east side of the pole about 15 feet above the ground and the other on the west side of the pole about 13 feet, 6 inches, above the ground. On the east side of the lower cross-arm were fastened two cut-out boxes,

the one on the north side of the pole being constructed of porcelain and the one on the south side of the pole being constructed of iron with openings in the bottom protected by porcelain tubes. The top of the iron cut-out box was about on a level with the top of the cross arm to which it was fastened. Two or more iron stand pipes, each encasing a large number of electric wires, were fastened to the sides of the pole and extended upward from beneath the surface of the ground to the several cross-arms. No wires were strung on the two lower cross-arms, and the wires which entered the two cut-out boxes on the lower cross-arm emerged from the end of one of the iron stand pipes. On the west side of the wooden pole, at a distance of 12 to 18 inches, was a latticed iron standard belonging to a street railway company, to which its trolley wires were attached. On the day preceding the accident in question, it became apparent that the excavation in the street might undermine the support of the wooden pole and cause it to sag or fall to the north, and to prevent this condition the superintendent of appellant directed two of its foremen to brace the pole, and the pole was then braced by a plank extending diagonally from the ground to the north side of the pole directly beneath the east cross arm. On the following day it was observed that the north end of the cross arm was being tilted upward by the pressure of the plank against it, and it was decided by Zimmerman, one of appellant's foremen, to brace the cross-arm by extending a short piece of timber diagonally from the north end of the cross-arm upward, and there spiking it. To assist him in so bracing the cross-arm Zimmerman called the deceased, who was employed by appellant as a common laborer and who was then digging in a ditch, and directed him to go up and help put the brace on. No inspection was made by appellant of the wooden pole or of the electrical

appliances thereon, and no directions were given by Zimmerman to the deceased, other than a warning to look out for the wires. Zimmerman went up the west side of the pole on the iron steps driven in the pole, and the deceased ascended to the required level on the latticed iron standard. When they reached the two lower cross-arms, Zimmerman stood on the east side of the pole looking west and the deceased stood on the west side of the pole looking east. Both of the men appear to have been standing on the lower cross-arm attached to the west side of the pole, the right foot of the deceased being partially on the cross-arm and partially on the iron cut-out box, the top of which was flush with the top of the cross-arm. When the piece of timber was placed in proper position to be spiked to the post, the deceased was directed to drive the spikes, and as he did so with his left hand, his left arm came in contact with a grounded iron stand pipe and immediately, upon the circuit being thus completed, he was electrocuted by a current of electricity, estimated at 3,300 volts, escaping from the iron cut-out box, at which point it was observed that flames enveloped his right foot. There was no special provision in the iron cut-out box to prevent the current from escaping into the metal cover. The porcelain tube insulators through which the wires were conducted into the box were insufficient and defective, and the leakage of electricity in the box produced a humming sound, which was observable upon an inspection immediately following the accident. The deceased was unfamiliar with the situation and had no knowledge or notice of the danger to which he was exposed. During the progress of the work in which appellant was then engaged, it frequently had occasion to brace up like poles belonging to other parties.

The original declaration consisting of one count alleges that the Commonwealth Edison Company allowed said out-

out box to remain insufficiently insulated, although it well knew the dangerous condition of the same, or in the exercise of reasonable care would have so known; that appellant was the employer of deceased, and it thereby became its duty to use reasonable care to furnish the deceased with a reasonably safe place to work; that although it knew, or, in the exercise of reasonable care would have known, of the unsafe and dangerous condition of the said cut-out box, it then and there ordered and directed the deceased to climb upon said pole to fasten a certain brace without informing or warning deceased of the dangerous condition of said cut-out box; that deceased climbed upon said pole and because of the dangerous condition of said cut-out box, as aforesaid, and while in the exercise of due care, he was then and there so shocked and injured, etc., that he died.

The first additional count charges that the Commonwealth Edison Company maintained said wires and said cut-out box without proper insulation or other safeguards to prevent the escape of said electricity; that said defendant knew or ought to have known of the dangerous condition thereof and had opportunity to remove the dangers before the happening of the accident; that appellant was the employer of the deceased, who was a common laborer, and ordered deceased to fasten a timber on poles near said cross-arm without informing or warning him that they were so charged with electricity and in such a dangerous condition as aforesaid; that the deceased while in the exercise of care, came in contact with the said cut-out box which was not properly insulated or safeguarded, as aforesaid, whereby he came to his death.

The second additional count alleges that the Commonwealth Edison Company maintained a certain pole and cut-out box; that said defendant permitted said cut-out box to become dangerous and unsafe; that deceased was employed by appellant

as a common laborer and it was the duty of appellant to furnish a competent and experienced foreman to warn and instruct him before taking him from his work on a ditch digger and putting him to other work; that appellant without warning, instruction or notice to the deceased of the aforesaid dangers of the said electrically charged wires, stand-pipe and cut-out box, then and there provided him with its foreman, who was also incompetent and inexperienced in working around electricity; that he was ordered by the foreman to fasten a brace on the pole; that this was dangerous and known so to be to the defendants, or would have been known to them in the exercise of care, and was unknown to the deceased and that he came in contact with said cut-out box as charged with electricity and so negligently and defectively maintained and safeguarded as aforesaid, thereby he came to his death.

It is urged that the court erred in denying the motion and instruction of appellant directing the jury to return a verdict finding it not guilty, for the reasons following:

First, appellant did not direct a trespass, but went upon the pole at the implied invitation of the Commonwealth Edison Company.

A consideration and discussion of this question might be pertinent and profitable if appellant and appellee were seeking to sustain a judgment against the Commonwealth Edison Company, but upon the record in this case the question is purely academic.

Second, the work being performed upon the premises of another appellant was not under the obligation to inspect nor did the duty to furnish a safe place to work arise.

Some cases from other jurisdictions afford a measure of support to this proposition advanced by appellant, but they are contrary to the settled doctrine in this state. Purtell

v. Philadelphia & Reading Coal Co., 236 Ill., 110, cited by appellant is not at all in point. It relates wholly to the duty imposed by law upon the owner of premises to persons upon the premises by express or implied invitation of the owner.

In Postal Telegraph-Cable Co. v. Lizza, 206 Ill., 249, appellee, a lineman in the employ of appellant, was injured by an uninsulated feed wire upon a pole belonging to the Chicago Telephone Company, or the Chicago & Milwaukee Telegraph Company, while he was at work upon said pole under the direction of appellant's foreman. The negligence charged in the declaration was that appellant failed to furnish appellee a safe place in which to do his work, failed to warn appellee of hidden and unseen dangers incident to his work, and that the foreman of appellant negligently ordered appellee to ascend the pole for the purpose of stringing and attaching wires to the arm of the pole. It was held the evidence tended to show that appellant was guilty of the negligence charged in the declaration no matter to whom the pole belonged, and without regard to whether the negligence of another company contributed to the injury, or whether such other company knew that appellant was engaged in stringing wires upon the pole in question.

In East St. Louis Ice & Cold Storage Co. v. Crow, 155 Ill., 74, the duty of the master to provide a reasonably safe working place for his servant upon a barge owned by another corporation and that a failure to perform such duty constituted negligence by the master were fully recognized, but it was there held that the defect complained of and the danger incident thereto were open and obvious to the servant and that he assumed the risk.

In McGrath v. Rowle, 192 Ill., 636, the duty of a master to provide his servant with a reasonably safe place to work was held to extend to a scaffold constructed by a third

person. In commenting on the case counsel seems to make a distinction between a scaffold as a "place" provided by the master and the pole here in question as a "point" not in the custody of the master, where the servant may temporarily go. We are unable to perceive any substantiality in the distinction thus sought to be made, and no such distinction was recognized by the court in the Likes case, supra.

In Keefe v. Armour & Co., 358 Ill., 38, cited by appellant, it was held that the duty of the master to furnish his servant with a reasonably safe place to work relates to the element of locality - the keeping of the premises physically safe -, and did not extend in that case to a tank which the servant was testing for leaks. If in the case at bar the death of appellee's intestate was attributable to some alleged defect in the wooden brace which he was directed to assist in placing upon the pole, the case cited would be applicable, but it has no application to the facts here involved.

Third, the doctrine res ipsa loquitur is not applicable under the facts of this case.

This case was not tried in the court below upon the theory that the doctrine res ipsa loquitur was applicable and a discussion of the applicability or non-applicability of that doctrine would be fruitless.

Fourth, the death of appellee's intestate was not a consequence reasonably to be foreseen, and was not a proximate consequence of any default or negligence of appellant.

If, as applied to the pole in question, a duty was imposed upon appellant to exercise reasonable care to furnish the deceased with a reasonably safe place to work, as we hold it was, such duty involved, under the facts in this case, the duty on the part of appellant of inspection for the purpose of ascertaining whether or not the pole in question was a reasonably safe place for the deceased to perform his work.

Electricity is a highly dangerous agent, and the instrumentalities, apparatus and appliances through and by which it is carried, controlled and distributed, are, when defective and out of repair, liable to inflict severe and fatal injuries to persons coming in contact therewith.

There is no evidence tending to show that appellant had actual notice of the defective and dangerous condition of the iron cut-out box, but it is chargeable as well with such knowledge and notice of the defective and dangerous condition of said cut-out box as it might have ascertained by the exercise of reasonable care. True, to constitute proximate cause it must appear that the injury complained of was the natural and probable result of the negligence charged, but this does not necessarily mean that the person guilty of a negligent act or omission might have foreseen the precise form of the injury. Smith v. Commonwealth Electric Co., 241 Ill., 352. Appellant was bound to know of the presence and location of the iron cut-out box upon the cross-arm of the pole in question and of the functions of such cut-out box with respect to connecting and disconnecting the circuit. It was reasonably to be anticipated that in performing the work of bracing the upper of the two lower cross-arms the deceased would stand upon the lower cross-arm to which the cut-out box in question was fastened, and that in so doing he would be liable to come in contact with said box. It is uncontroverted that because of its defective condition the cut-out box was observed to give out a humming sound immediately after the deceased was removed from the pole, and it is clearly inferable from the evidence that the humming sound referred to was present before the deceased was directed to work upon the pole. Whether or not a reasonably careful inspection of the pole by appellant would have disclosed to it the defective and dangerous condition of the cut-out box, and whether or not the failure of appellant to make such inspection constituted

negligence were questions properly submitted to the jury and their finding upon the questions so submitted is not unwarranted by the evidence.

Sixth, the order was not negligent nor was there any duty of warning.

If appellant was chargeable with knowledge of the defective and dangerous condition of the cut-out box, it was incumbent upon it to warn the deceased of such defect and danger. The deceased, as appellant well knew, was merely a common laborer unfamiliar with the special hazards incident to the place where he was directed to work, and in the absence of such knowledge to the contrary, as he might in the exercise of reasonable care for his own safety have obtained by observation, he was justified in assuming that appellant had properly performed its duty of inspection and that the place where he was directed to work was free from latent and hidden defects and dangers.

In Consolidated Coal Co. v. Haenni, 146 Ill., 614, it is said:

> As to the master's duty to give notice, the law is that, if there are latent defects or hazards incident to an occupation, of which the master knows or ought to know, and which the servant, from ignorance or inexperience, is not capable of understanding and appreciating, it is the master's duty to warn or inform the servant of them. (Smith v. Peninsular Car Works, supra; Wood's Law of Mas. and Serv. sec. 349; Lalor v. C., B. & Q. R. R. Co., 52 Ill. 401; Consolidated Coal Co. v. Wombacher, 134 id. 57.)"

Upon the facts adduced by the evidence as heretofore stated the finding of the jury upon the issues of assumed risk and contributory negligence must in this case be held to be conclusive.

Objection is urged to the ruling of the court in excluding certain evidence offered by appellant. The evidence sought to be adduced related merely to an issue raised at the trial between the two defendants involving the right of

appellant to use the pole in question as a working place for the purpose of bracing the cross-arm. The proffered evidence was properly excluded, but assuming it was improperly excluded its exclusion did not affect the question of the liability of appellant to appellee.

It is said that the court erred in entering judgement and overruling the points of variance, in that the declaration was for joint or concurring and inseparable neglect of two parties, whereas the verdict and judgment was against one.

This question was fully discussed and determined contrary to the contention of appellant in Postal Tel. Cable Co. v. Likes, supra, and the rule there announced, and which is applicable to the declaration and proofs in the case at bar, has been adhered to in so many cases that further discussion of the question would be profitless. We cite the following: Nordnaue v. Vandalia R. R. Co., 242 Ill., 166; Pecararo v. Malberg, 248 Ill., 95; Linquist v. Hoppes, 248 Ill., 491; Hummson v. Mich. Cent. R. R. Co., 259 Ill., 462.

The third instruction tendered by appellant and refused by the court, was properly refused, because it wholly ignores the duty imposed by law upon appellant under the facts of this case, to warn or inform the deceased of the dangers incident to the place where he was directed to work, of which dangers the deceased by reason of his ignorance and inexperience did not have knowledge or of the existence of which he was not chargeable with knowledge. The instruction is also objectionable because it singles out one particular fact in the case and directs the jury as a matter of law that such fact does not warrant a recovery. West Chicago St. R. R. Co. v. Petters, 196 Ill., 298; Weston v. Teufel, 213 Ill., 291; Chicago City Ry. Co. v. Lowitz, 218 Ill., 24. By other instructions given to the jury they were fully and fairly advised as to the law upon the subject of assumed risk.

The fourth and sixth instructions requested by appellant and refused by the court were properly refused not only because there is no evidence in the record to predicate the hypothesis upon which they are based, but because they do not announce a correct rule of law. In directing the deceased to go upon the pole and perform the work in question, appellant must be held to have adopted the pole as it place of work furnished to the deceased, and the fact that the pole was owned by another corporation did not exempt appellant from the duty imposed upon it as the master.

The fifth refused instruction is so indefensible that the objection to the ruling of the court in refusing the same merits no consideration.

The seventh refused instruction was sufficiently covered by other instructions given to the jury.

Complaint is made of several instructions given at the instance of appellant's co-defendant, the Commonwealth Edison Company. The contest in the court below appears to have been most spirited between the two defendants, in the effort of each to shift liability, if any, upon the other. No instructions were requested or given on behalf of appellee and appellee cannot properly be held responsible for any errors which may have been induced by appellant or its co-defendant.

Ordinarily, where a plaintiff properly recovers a judgment against one of two defendants, he is not concerned in the question whether or not the court erred in its rulings between the two defendants. Schmidt v. Chicago City Ry. Co., 239 Ill., 494; Nordhaus v. Vandalia R. R. Co., 240 Ill., 166. In Consolidated Fireworks Co. v. Koehl, 190 Ill., 145, a judgment in favor of the plaintiff against one of two defendants was reversed at the instance of the defeated defendant upon the ground that the court erroneously directed the jury to

find the other defendant not guilty and thereby improperly withdrew from the jury a disputed issue of fact. In the case at bar, the main contention of the Commonwealth Edison Company was that in directing the deceased to go upon the pole in question appellant became a trespasser, and that the Commonwealth Edison Company was thereby absolved from liability, and the instructions complained of relate to that issue. It is not claimed, except upon the authority of Flanigan v. Fells Bros., 337 Ill., 82, that a finding upon that issue that appellant was a trespasser would not absolve the Commonwealth Edison Company from liability. The case cited is not in point. The relation between the parties involved in the instruction, which was held to have been properly refused in that case, was that of sub-contractors. No such relation existed between the defendants in the case at bar. It is also urged that none of said instructions improperly assumes that the foreman of appellant directed or ordered the deceased to go upon the pole in question. This was not a controverted question in the case, and the assumption of the undisputed fact was not harmful to appellant.

It is finally urged that the amount of the verdict is excessive and is manifestly the result of passion and prejudice. There is nothing apparent in the record that could have operated to improperly influence the jury by arousing their passion or prejudice.

At the time of his death the deceased was thirty years of age. He left surviving him a widow and one child. He was a healthy, robust man, an industrious worker and of good habits. He was then earning from $1.80 to $2.00 a day, and had previously earned $18 a week doing plumbing work.

While the damages awarded are amply adequate, and possibly greater than are ordinarily awarded under like circumstances, we are not prepared to say they are so excessive

as to warrant the requiring of a resititur or the reversal of the judgment.

There is no substantial error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.